INDEX.

TABLE OF AUTHORITIES.

Cases.

Senate Report.

Statutes.

n the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 274.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE SANDS MANUFACTURING COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

RESPONDENT'S BRIEF.

The National Labor Relations Board, the Mechanics ducational Society of America, the International Associaon of Machinists District No. 54 affiliated with the Amerin Federation of Labor, The Sands Manufacturing Comany, and the National Labor Relations Act (Act of July 1935, C. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, ecs. 151 *et seq.*), respectively will be hereinafter referred as the Board, the MESA, the A. F. of L., the respondt, and the Act. Those of respondent's former employees ho were members of the MESA will be referred to as the omplaining Employees.

PROCEEDINGS BEFORE THE BOARD.

Upon the complaint charging violations of Section 8, subsections 1, 3, and 5 of the Act (R. 7), respondent's answer alleging negotiations to an impasse to secure performance of a contract and breach of contract as a defense (R. 11) and the evidence (R. 100-583), the Board's Trial Examiner in an Intermediate Report (R. 42-62) found that respondent had violated Section 8, subsections 1 and 3 of the Act, but not Section 8 (5) and stated that because, in his opinion, for much of the difficulty the Complaining Employees themselves were responsible, he recommended their reinstatement *but without back pay.* (R. 62.)

Respondent filed a brief and made an oral argument before the Board in support of its Exceptions (R. 63-99), but the Board arbitrarily denied to respondent and its counsel the right to be present at and to hear and reply to such argument as was made before the Board by the Board's counsel, the Board announcing at the conclusion of respondent's argument that the Board would hear the Board's counsel in the absence of respondent and its counsel, to which respondent duly excepted. (R. 619.)

The Board arbitrarily disregarded respondent's Exceptions. In its findings of fact and conclusions of law and order, it held that respondent's contract with the Complaining Employees and their alleged breach of it were immaterial and irrelevant, and that respondent had violated Section 8, subsections 1, 3, and 5 of the Act, and it ordered reinstatement of forty-seven (47) former employees with back pay from September 3rd, 1935, which back pay at the present time probably amounts to more than $100,000.00.

IN THE COURT BELOW.

To the Board's petition for enforcement filed April 12, 1937 (R. 615) respondent filed its answer and cross-petition for review (R. 619), to the latter of which the Board filed no reply.

In its cross-petition for review respondent alleged in detail that the Board had arbitrarily refused to find certain material facts; that certain findings made by the Board were arbitrary, and not supported by any substantial evidence; and that upon the evidential facts as they were found by the Board, and the admitted facts, its conclusions and its order were erroneous. (R. 619.)

As stated by the Court below (R. 610), the findings of the Board, if supported by evidence, are conclusive (Sec. 10-e of the Act).

But, as interpreted by this Court, the requirement is that the findings be supported by *substantial* evidence. *Federal Trade Commission vs. Curtis Publishing Co.*, 260 U. S. 568, 43 S. Ct. 210, 67 L. ed. 408; *Washington, Virginia & Maryland Coach Co. vs. National Labor Relations Board*, 301 U. S. 142, 147, 81 L. ed. 965, 969-970, 57 S. Ct. 648, 650; *Consolidated Edison Co. et al. vs. National Labor Relations Board*, 83 L. ed. Adv. Opinions, pages 131, 140.

In challenging the Board's findings of fact respondent did not attempt to circumvent these rules. Rather, respondent contended that because facts material to its defense of no violation of the Act were proven, either by uncontradicted evidence or by testimony adduced from the Complaining Employees themselves, the refusal of the Board to find said material facts thus proven was arbitrary and error and the order should be set aside. *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 47, 81 L. Ed. 893, 917, 57 S. Ct. 615, 629.

Respondent also contended, in accordance with Section 10-(e) of the Act, that, upon the "pleadings, testimony and proceedings" set forth in the transcript, in the interests of justice, the Court below should examine the whole Record, ascertain for itself the issues presented and whether there were material facts not reported by the Board.

> "Under such a review, the Commission's findings of fact are conclusive, if supported by evidence; but the Court may examine the whole record and ascertain

for itself whether there are material facts not reported by the Commission; and if there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, and the interests of justice clearly require that the controversy be decided without further delay, the Court has full power under the statute to do so without referring the matter to the Commission for additional findings."

Federal Trade Commission vs. Curtis Publishing Co., supra (Syl. 2).

The same rule was approved in *International Shoe Co. vs. Federal Trade Commission,* 280 U. S. 291, 297, 50 S. Ct. 89, 91, 74 L. Ed. 431, 440.

The Court below, upon the Board's findings and the admitted facts, by unanimous opinion held that respondent had not violated the Act. It set aside the Board's order, and dismissed the Board's petition to enforce. (R. 607.) 96 F. (2d) 721.

SUMMARY OF ARGUMENT.

The Board said:

"the case against the respondent is not in any way prejudiced if the stand of the shop committee * * * is considered a violation of the agreement." (R. 36.)

The Court below said:

"We disagree with this view." (R. 610.)

The fundamental and decisive question of law presented by this case is, did the contract between respondent and the Complaining Employees impose upon the latter an obligation to render their services to respondent during the term thereof in accordance with its provisions?

During the term of its second contract with the Complaining Employees, made during the second year of its dealings with MESA, respondent abrogated said contract, filled the places of the Complaining Employees, and dis-

harged them. From the evidential findings of the Board nd the admitted facts it is clear that the union membership f the Complaining Employees was not the cause of their ischarge. Rather, respondent filled their places because, fter negotiating with them for two months in an unsuccess- ul effort to induce them to withdraw their refusal to permit espondent to operate its plant "by departments" in ac- ordance with its contract with them, they told respondent n August 21, 1935, it could shut down its plant, but that it ould not give effect to the rule.

The complaint charged that respondent had violated ection 8, subsections 1, 3, and 5 of the Act by its acts sub- equent to August 21st. (R. 7.) The respondent justified aid acts by alleging negotiations to an impasse to secure erformance of their contract by the Complaining Em- loyees, and their breach of contract. (R. 11, 16-23.)

The Board held that whether or not the Complaining mployees had broken their contract was immaterial and rrelevant and, therefore, did not decide whether or not here had been a breach of the contract. (R. 36.) It made s evidential findings of fact, and its conclusions of law nd fact on that basis.

Respondent contends that because the complaint is ased upon respondent's acts after August 21st, which acts ere a continuous progressive course of conduct begun fter that date, the motivating cause for said acts must be etermined from the admitted facts concerning, and the evi- ential findings which the Board made from, the events hich transpired on August 21st and theretofore.

Respondent contends that respondent's acts after ugust 21st must be considered in the light of the true otivating cause for said acts, and that, because the Board und respondent was honest in its interpretation of the ntract (R. 36), its impelling motive was to obviate need- ss expense (R. 36), and the employees were adamant in eir refusal (R. 37) on August 21st, it was arbitrary for

the Board to refuse to consider respondent's acts after August 21st in the light of these facts, and to hold that the breach of contract was immaterial.

The respondent's rights and its obligations toward the Complaining Employees after August 21st depended on whether or not they had broken their contract.

The Board could not properly decide whether or not an impasse had been reached on August 21st without deciding whether or not the position of the Complaining Employees was in violation of the contract.

The elements of an impasse in negotiations to secure performance of a contract and of an impasse in negotiations looking toward the making of a contract are different. They give rise to different rights.

Respondent was not required to negotiate to secure performance of a contract already made to the same extent that another employer is required to engage in negotiations looking toward the making of a contract. Certainly if the contract imposed upon the employees an obligation to perform, respondent's obligation to negotiate to secure performance was fulfilled by approximately two months of sincere negotiations.

Respondent's rights and its obligations toward the Complaining Employees after August 21st depended also upon whether or not they had given cause for discharge, whereas, the Board held that the rights of the Complaining Employees were the same regardless of whether or not they had given cause for discharge.

We contend that the contract and the breach of it were material and relevant and that because the Board's findings of ultimate fact were based upon an erroneous conception of respondent's rights, they are in themselves erroneous and the order was properly set aside by the Court below.

Therefore, Point One of this brief is devoted to showing from the evidential findings of the Board and the admitted facts that the union membership of the Complaining

Employees was not the cause for respondent's acts after August 21st. Point Two is devoted to showing that the impasse and the employees' breach of their contract was the cause for said acts. Point Three is devoted to showing that when respondent's acts after August 21st are considered in the light of their motivating cause as shown in Point Two and the rights of the Complaining Employees and the respondent with reference to each other resulting from the impasse and the breach of contract, there was no violation of the Act which justified the Board's order against the respondent.

The assignments of error and the Board's order are discussed following Point Three.

The Government charges the Court below with honoring section 10 (e) of the Act with "lip service" only. (G. Br., 47.) The evidential findings of the Board and the admitted facts hereinafter cited will show the Government's charge to be unfounded and unfair, a potent illustration of the arbitrary and unreasonable action of the Board concerning which respondent complained in the Court below.

ARGUMENT.

POINT ONE.

UPON THE EVIDENTIAL FINDINGS OF THE BOARD AND THE ADMITTED FACTS THE COURT BELOW RIGHTLY HELD THAT RESPONDENT DID NOT DISCHARGE THE COMPLAINING EMPLOYEES BECAUSE THEY WERE MEMBERS OF THE MESA AND HAD ENGAGED IN CONCERTED ACTIVITIES FOR THE PURPOSE OF COLLECTIVE BARGAINING.

The Government admits this to be the main and decisive issue in this case. (G. Br., p. 40.)

The foundation intended to support the Board's order its following finding of ultimate fact:

"The whole conduct of the respondent leaves no other reasonable inference than that the old employees were locked out, discharged and refused employment

> because they were members of the Mechanics Educational Society of America and had engaged in concerted activities for the purpose of collective bargaining." (R. 38, 39.)

Contrary to the Board, the Court below held:

> "In this case no evidence appears that the employees were discharged because of their membership in the MESA or any union." (R. 613.)

In its opinion the Court below, after stating the facts, stated its rule of decision as follows:

> "The findings of the Board as to the facts, if supported by evidence, are conclusive. The Court may not, by substituting its own conclusions, reverse the Board's findings unless the evidence affords no reasonable basis for them. *Agwilines, Inc. vs. National Labor Relations Board*, 87 F. (2nd) 146, 151 (C. C. A. 5). The contention here is that the Board refused to make certain findings supported by the evidence, and that its conclusions either are based on no evidence, or are contrary to the Board's own findings of fact. The facts for the most part are not in dispute, and *the principal question is whether the Board's findings, taken together with the admitted facts, compel a different conclusion.*" (R. 610.) (Emphasis ours.)

What were the Board's findings and the admitted facts which compelled the Court below to come to the conclusion stated above?

We will follow the statement of the Court below as to the facts. We will support said statement, and any explanatory additions to said statements, either with citations to the Board's findings, to evidence given by the Complaining Employees themselves, or to uncontradicted evidence given by respondent's witnesses. The statements of the Court below will appear in quotations.

A. Respondent's dealings with MESA previous to the contract of June 15, 1935.

The uncontroverted facts show no attempt whatever on the part of respondent to prevent organization of its employees or to discourage their affiliation with the MESA or interference after they had organized. There is no evidence whatever of espionage or coercion practiced by respondent.

On the other hand, the evidential findings show that respondent afforded to all the Complaining Employees, at all times while they were employed by it, all of their rights under Section 7 of the Act.

> "Early in 1934 practically all of the employees joined the MESA and designated three of their number as a committee to represent them for purposes of collective bargaining." (R. 28, 608.)

The organization of respondent's employees was without any opposition on the part of respondent whatsoever. (R. 127.) In fact, respondent encouraged its employees to organize by stopping its factory during working hours so as to permit them to do so. (R. 407, 408.)

> "No question is raised as to the committee's authority. Respondent immediately recognized and conferred with the shop committee whenever requested to do so." (R. 29, 128, 608.)

> "The parties operated under a mutual agreement for increase in wages from May 2, 1934, until May, 1935." (R. 29, 598, 608.)

> "In the fall of 1934 the MESA agreed that respondent could hire additional workmen to fill a projected Government order, on condition that it discharge such additional men when the order has been completed. This promise was carried out by the management. Practically all of the men newly hired became members of the MESA, and respondent in no way opposed this membership." (R. 29, 608.)

Throughout the entire year from May, 1934 to May, 1935, respondent negotiated with the MESA and the latter never had any trouble securing meetings with respondent. (R. 129, 613.)

> "In May, 1935 the shop committee asked for a wage increase, and when this was denied, called a strike on May 21, 1935. Negotiations continued during the strike, and an oral agreement was entered into under which the strikers returned to work on June 3, 1935, but struck again on June 6th, because respondent had refused to reinstate seven of the strikers. Respondent claimed that these men were inefficient, and Potter, representative of the MESA, said that several of them might be incompetent." (R. 29, 30, 138, 164, 608.)

The committee agreed that some of them were not competent workmen but took the position that the company had to prove it. (R. 269.)

One of them, Norman, was later discharged for inefficiency with the consent of the shop committee. (R. 35, 425.)

> "Further negotiations were held, and the contract of June 15, 1935, resulted. It was drafted by the shop committee of the MESA, certain changes being made at the insistence of respondent. The contract provided for an increase of wages, for the discharge of certain employees objected to by the shop committee, and otherwise regulated the conditions of employment. The employees, including the seven whom respondent wished to discharge, then returned to work." (R. 30, 155, 277, 289, 575, 576, 600, 608, 609.)

By its terms said contract was to remain in force until March 1, 1936. (R. 600.)

B. Negotiation of the June 15, 1935 agreement.

At the time of the organization of respondent's employees by the MESA, Potter had been employed by

respondent and became a member of the shop committee. (R. 29.) Later in 1934, he left respondent's employ and became State Chairman of the MESA. (R. 29.)

Potter last participated in negotiations with the respondent on May 30th or May 31st, 1935. He was not a member of the shop committee, nor present in the negotiations by which the second strike, which occurred June 6, 1935, was settled. (R. 147, 148.) From that time all negotiations were handled by the shop committee without Potter. (R. 31, 158.) By the terms of the contract of June 15, 1935, no one person could negotiate in behalf of the employees. (R. 603.) Because of the importance which the Board attaches to a telephone call by Potter on September 4, 1935 (R. 33) these facts are important.

> "It had been respondent's practice when work was slack to transfer men from their regular departments to other departments." (R. 31, 611.)

When men were so transferred they continued to receive their regular wages, irrespective of their inefficiency in the department to which they were transferred. Wages of employees of respondent depended on length of service. (R. 31.) There was no piece work in respondent's plant. (R. 488.)

> "Respondent considered this practice inefficient, and therefore, when the contract was being negotiated, it insisted that the words 'and by departments,' at the end of paragraph (5), be inserted. The express purpose was that respondent might discontinue the practice of calling old men back except to their own departments, and members of the shop committee testified in effect that it was intended to enable respondent to 'run by departments.'" (R. 34, 574, 575, 576, 579, 289, 291, 365, 611, 612.)

The word "only" was also inserted in paragraph (6) at the instance of respondent. (R. 612.) (Compare R. 603, an early draft of said contract, with R. 600, the final draft.)

"Paragraphs (5), (6), and (7) of the contract, which are the portions in controversy, read as follows:

'(5) That when employees are laid off, seniority rights shall rule, and by departments.

'(6) That when one department is shut down, men from this department will not be transferred on work in other departments until all old men only within that department, who were laid off, have been called back.

'(7) That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days.'" (R. 600, 611.)

Some of the testimony of the members of the shop committee as to their understanding of the agreement is cited under respondent's first and second exceptions to the Intermediate Report. (R. 63-67.) Typical of such testimony is the following:

"A. You mean you would transfer from those departments?

Q. Yes.

A. You couldn't do that.

Q. The committee agreed to that?

A. Yes, sir." (Jindra, R. 576.)

"A. That is going against your contract. You have seniority in the contract, and when they work, they stayed and died there." (Jindra, R. 579.)

* * * * *

"Q. That would be against that rule, wouldn't it? Let us be fair.

A. When employees are laid off, seniority rights shall rule." (It will be noted that the witness quoted only a portion of clause 5 above.)

"Q. Go ahead.

A. That is as far as I will go." (Moraco, R. 289.)

Respondent's dealings with MESA after the contract of June 15, 1935.

"Shortly after the execution of the contract respondent posted in its plant a classification of its employees by departments and thus gave notice of its intention and desire to proceed under the contract." (R. 612, 170, 175, 206, 574, 579, 434, 518.)

The intended effect of the posting of the classification was admitted by a member of the committee. (Jindra, R. 574, 579.)

He testified that "it stayed that way, it was understood." (R. 574.) Important as this classification was, bearing directly upon respondent's good faith throughout this whole controversy, the Board arbitrarily refused to find that it was made and posted. (R. 70.)

Discussions between the shop committee and the respondent concerning the application of the rule of departmental seniority began when the men returned to work on June 17th. (R. 294, 297, 573.) They continued throughout July. (R. 289, 290, 291, 363, 387.) Meantime the respondent again "tried out" the old practice and again condemned it. (R. 290, 291, 371, 386, 387.)

"It is plain, however, that this" (transferring men from one department to another) "was done because of the insistence of the men and because of constant fear of strikes." (R. 289, 290, 291, 387, 612.)

Paragraph 20 of the agreement of June 15th was a constant threat to strike. It provided as follows:

"In case of a misunderstanding between the management and the employees, the committee shall allow the management forty-eight (48) hours to settle the dispute, and if then unsuccessful the committee shall act as they see fit." (R. 602.)

"By the middle of July respondent had filled the orders accumulated during the strikes, and after conference, the men in its tank heater department, with the exception of the foreman, were laid off, and the

plant was operated on a schedule of three days a week." (R. 30, 283, 609.)

The foreman of the tank heater department was an "old" man. (R. 215.) He was also the financial secretary of the MESA local. (R. 224.)

The plant went on three days per week, employing only the "old" men, pursuant to notice dated July 30th. (R. 221, 222, 518.) The committee insisted that the respondent lay off all "new" men and go on this shortened work schedule despite the fact that there was need for increasing the machine shop working force (R. 30, 31, 517), and despite the fact that this action was against the interest of the 4 "old" men and the 5 "new" men who were then employed in the machine shop and who could have continued work full [redacted] but for the action of the committee. (R. 560, 580.)

Respondent's machine shop is its key department. (R. 31.) In order to operate its plant efficiently it is necessary that respondent's machine shop be thirty days ahead of the remainder of its plant. (R. 374, 459.)

> "Respondent wished to increase the force in the machine shop in order to prepare stock, and to employ for that purpose 'new' men experienced in machine shop work, instead of transferring 'old' men from other departments, claiming that the contract of June 15th entitled it to this method of operation." (R. 31, 284, 286, 371, 375, 609.)

In the contract of June 15, 1935, the 31 men who were employees of the respondent prior to the Government order of 1934 were designated as "old" men and those employed while the Government order was being filled were "new" men. (R. 30.) Thus the "new" men were all former employees temporarily laid off.

> "At this time a number of the machine shop employees were members of the International Association of Machinists affiliated with the American Federation of Labor." (R. 32, 609.)

"The shop committee contended that under the contract no new men could be hired for the machine shop so long as old men in other departments of the plant were not employed." (R. 31, 371, 609.)

This position was taken for a purely selfish motive of the old men who made up the shop committee (R. 597), and without regard for the rights of the "new" men who could have immediately been put to work, had the shop committee been fair to "new" men. Pansky testified that the committee had no objections to putting "new" men in the machine shop as long as the old twenty-nine worked. (R. 376.)

Repeated conferences were held between the management and the shop committee in reference to this matter. The management claimed that the shop committee was insisting upon a violation of paragraph (5) of the agreement. (R. 31.)

The views of the employer and the employees were diametrically opposed, both as to the meaning of the contract, and as to whether respondent should hire "new" men for the machine shop. (R. 31, 386, 423, 428, 609.)

That the position taken by the committee was wilfully in violation of the contract and of their own interpretation of the meaning of paragraph (5) thereof is attested by the testimony of the members of the committee who testified on the subject (Moraco, R. 289, Jindra, R. 574, Pansky, R. 365), some of which is quoted above. Pansky, a member of the committee, testified as follows:

"Q. By departments. I am going to leave it to you to tell me what you thought that meant?

A. Well, according to the contract, I understand the contract to read when it means seniority by departments you have newer men laid off, than the older men.

Q. In particular departments?

A. No new men.

Q. Not to be shifted from one department to another but each department to be filled up by men who had seniority rights; that is what you thought?

A. Yes." (R. 365.)

The Board arbitrarily refused to find that the members of the shop committee understood the contract to provide for departmental seniority (R. 63), although it is plain that such was their understanding. This becomes important as tending to show that the later action of the committee was arbitrary and in wilful violation of their own understanding of the agreement.

> "The discussions were held at frequent intervals until August 19, 1935, when the shop committee was asked by the management to consult with the men and report whether they desired that the working force in the machine shop should be increased by new men while other departments were temporarily shut down, or that the whole plant should be temporarily shut down. The committee stated that it preferred that the plant be shut down. Respondent closed its factory on August 21st." (R. 31, 32, 609.)

The exact nature of the committee's reply on August 21st to respondent's request of August 19th that the committee go back to the men to see if they could find a "solution to the problem" (R. 431, 433, 519, 570), is more illuminating than the evidential finding of the Board just cited. Pansky, a committeeman, admits that Garry Sands asked the committee for a "solution" of the problem on August 19th. (R. 570.) He also testified that at the August 21st conference the committee told the respondent:

> "He could shut down for a couple of weeks if he preferred it, but he couldn't lay off the old men first." (R. 377.)

Jindra, another committeeman, testified to the same effect:

> "We could see no way out, so we told the management to shut down the plant as agreed." (R. 572.)

That the MESA employees had all agreed to the committee's answer is attested by Pansky's testimony:

"Q. And that was what you had been instructed to do by the men with whom you had talked out at the shop?

A. That was the men's choice." (R. 377.)

1. No agreement was made between respondent and the MESA on August 21st, 1935.

The Government states that a compromise agreement was reached on August 21st. (Br. pp. 20-23.) Nothing could be farther from the facts. Respondent did not want to shut down. It could always shut down without the consent of the committee. It wanted to operate its machine shop with machine shop employees and shut down the other departments which had been operating with old men on a three day per week schedule (R. 31), whereby even the committee admitted nothing was being accomplished. (R. 572.) The committee had been adamant in its position that the machine shop force could not be increased with "new" men while the "old" men in other departments were laid off. (R. 31.) The respondent asked the committee for a "solution" of the problem. (R. 570.) The committee's answer, after consulting with the MESA employees, was: "He could shut down for a couple of weeks *if he preferred it, but he couldn't lay off the old men first.*" (R. 377, 572.)

Such evidence, coming from members of the shop committee, can mean only that the MESA employees had determined to unitedly persist in their adamant position against departmental seniority, and that, in view of paragraph 20 of the contract (R. 602), if respondent had recalled former employees to the machine shop and laid off the old men in other departments, there would have been an immediate commencement of strike activities. The MESA gave respondent an ultimatum, a choice between two

alternatives, neither of which, because of the contract, they had the right to impose upon respondent, and the respondent shut down. The Government calls that an agreement! An agreement the consideration of which was that the MESA would refrain from doing what they were already bound not to do by virtue of their contract, namely, strike.

D. Respondent's acts after August 21st, 1935.

The ultimate finding of the Board, to the consideration of which Point One of this brief is entirely devoted, is that the Complaining Employees were discharged and their places filled because they were members of the MESA and had engaged in concerted activity for the purpose of collective bargaining. (R. 38, 39.) Respondent's acts by which this was accomplished all took place after August 21st. On that date respondent last dealt with the MESA. (R. 32.) The motivating cause for respondent's acts after August 21st, which resulted in the abrogation of its contract with MESA, the discharge of the MESA employees and the filling of their places, must be found in the admitted facts concerning, and the evidential findings which the Board made from the evidence of, the events which transpired on August 21st and theretofore, and from subsequent admissions of the respondent, if any, as to the motivating cause for said acts. There is no evidential finding as to any such admissions and there were none. Respondent's acts after August 21st, therefore do not logically belong in this portion of this brief wherein not what was done after August 21st, but why it was done, is the matter under consideration.

However, for the sake of giving continuity to the factual picture and of better raising the issues we will at once set forth the events which transpired after August 21, 1935. We will reserve the discussion of the legal effect of respondent's acts which occurred subsequent to August 21st

Point Three in this brief. The events subsequent to ugust 21st follow.

"Shortly thereafter it" (respondent) "negotiated an agreement with the International Association of Machinists, affiliated with the A. F. of L., and sought experienced machinists through the Cuyahoga County relief organization." (R. 32, 586, 609.)

The negotiations with the International Association of achinists took place on August 26th or 27th. There is not syllable of testimony as to any previous contact by re-ondent with the A. F. of L. The agreement with the F. of L. was executed on or about August 31st and be-me effective September 3rd. (R. 32.)

"On September 3rd the respondent opened its machine shop, invited a number of its former machine shop employees, all members of the International Association of Machinists, to return to work, but filled other places in the machine shop with new men instead of calling old men from other departments of the plant." (R. 32, 609.)

The International Association of Machinists also sup-ed the respondent with new help. (R. 32.)

"Forty-eight men, all members of the MESA were not recalled. Respondent offered individual contracts to four of the old MESA men whom it wished to employ as foremen. To two of them the offer was made upon the condition that they join the International Association of Machinists." (R. 32, 327, 338, 381, 391, 449, 543, 609.)

After an evidential finding that the A. F. of L. member-p was discussed with only two of the old men, and then y after respondent's plant was in operation with A. F. L. workmen (R. 32, 33), the Board arbitrarily found as ultimate fact that it was made a condition of employment all four old men. (R. 39.) The error, corrected by the urt below, is now admitted by the Government. (G. Br. 3.) These two discussions concerning union membership

occurred on September 4th, the day after respondent's plant reopened. (R. 32, 33.)

The Board found that on September 4th Potter, over the telephone, asked for a meeting with respondent, which the management refused. (R. 33, 34, 610.)

The MESA shop committee never communicated with respondent after August 21st, nor did it after that date and even during the trial evidence any intention to withdraw in the slightest degree from the position it had taken in reference to departmental seniority prior to that date. The Board arbitrarily refused to make this finding (R. 76), although the evidence in support of it is positive and undenied. (R. 530.)

Beginning September 4th, the MESA picketed respondent's plant for a month during all of which time the respondent's plant continued to operate. (R. 34.) Shortly after the plant reopened on September 3rd three of the MESA employees applied for work and were reemployed by respondent. (R. 231.) They were promptly suspended for so doing by the MESA (R. 231) and no more applied for work during the picketing or until after all the places were filled. (R. 33, 535.)

The Board has treated respondents acts after August 21st, 1935, by which it abrogated its agreement with MESA and obtained a working force that would comply with the rule of departmental seniority, without regard to respondent's motive and as a series of isolated, disconnected acts. However, the Board's evidential findings show these acts to be a consistent progressive course of conduct in pursuance of a lawful purpose, and of the same effect as if by one act the respondent, through their agent, the A. F. of L. Union, had hired a new working force, thereby displacing and discharging the Complaining Employees.

We now return to the statement of those evidential findings and admitted facts which prove conclusively that the Complaining Employees were not discharged because

they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining.

E. The Board found that respondent was honest in its interpretation of the contract.

The Board found specifically that respondent was honest in its interpretation of the contract. (R. 36.) It follows, therefore, that the respondent carried on the negotiations in absolutely good faith. The Board refused to interpret or construe the contract (R. 63, 64) but the construction put upon the contract by the Court below (R. 612) substantiates respondent's honest interpretation of it.

F. Respondent had sustained heavy losses.

The Board refused to find, although the testimony is uncontradicted, that during the year 1933 respondent lost $20,000, that during the year 1934 respondent lost $40,000, and that prospects for the year 1935 were that respondent would continue to lose money. (R. 532.)

G. The Board found that respondent's impelling motive was to cut operating costs.

The Board specifically found that the impelling motive of the respondent in insisting upon the enforcement of the rule of departmental seniority set forth in the contract was to cut operating costs. In its findings the Board states:

> "Rates of pay in the respondent's plant depended on length of service and not on the nature of the work. Thus, when old men were transferred to any department, they continued to receive higher rates than younger men in the same department. We are inclined to believe that the *impelling motive* for the opposition of the respondent to transferring the old men to the machine shop instead of hiring new men lay in this fact. In fact, Garry Sands testified that after the shutdown of August 21st, he complained to Albert Farrell, one of the old men, about the unfairness of

transferring men receiving high wages to do work which could be done by men receiving much less." (R. 36.)

This motive is expressly admitted by the Government. (Gov. Br., p. 7.)

H. There is no finding that respondent ever refused to employ MESA members who were willing to work for respondent under the rule of departmental seniority set forth in their contract with respondent.

The Board found that the Complaining Employees would have struck rather than permit enforcement of the rule of departmental seniority. (R. 31, 37.) The rule was established by contract. (R. 31.) Before respondent should be penalized for replacing the MESA employees, in view of the long previous negotiations, they must show a tender of their services on the terms under which they had agreed to work. This the employees never did.

There is no finding that any of the Complaining Employees ever offered to perform their contract with respondent after August 21st, 1935, either individually or collectively. There is no evidential finding that respondent ever refused to hire any person solely because he was a member of the MESA.

Furthermore, none of the Complaining Employees were ever refused employment at a time when there were available jobs. The Board says:

> "A few of the old men asked respondent for work after the plant reopened, but were told that their places were taken." (R. 33.)

There is no finding that all the places were not filled. The evidence is that all places were then filled. (R. 535.) Furthermore, it is uncontradicted that none of the MESA employees asked to be reemployed until about thirty days after the plant had reopened and after the picketing by the MESA had ceased. (R. 535.) That their places were then

. The MESA suspended all of its members who were re-employed by respondent after September 3, 1935.

At least three MESA employees applied for reemploy-ient while jobs were available after September 3, 1935, nd they were reemployed. (R. 231.)

The reason that only a few of the MESA employees pplied for reemployment, and then only after a lapse of hirty days after the plant reopened, was conclusively es-ablished to be because the Mesa adopted a policy of sus-ending any member who went to work for respondent fter September 3, 1935. In fact, the three of them who here reemployed were immediately suspended. (R. 230, 31.) Although this finding was arbitrarily refused by the oard (R. 76), the fact was admitted by the secretary of he MESA union to which the employees belonged. (R. 30, 231.) It was not denied.

The Board found that further negotiations would have accomplished nothing.

The Board itself appraised the chances of the em-oyees' committee ever agreeing with respondent that ey should work under the rule of departmental seniority t forth in the contract. Its own finding as to what would ve been the position of the committee if on August 21st, 35 the respondent had told it that the Complaining Em-oyees would be discharged unless they worked under the le of departmental seniority was:

> "It is inconceivable that the committee would have accepted this, especially since the men had been so successful when they struck a few months earlier." (R. 37.)

In other words, there would have been a strike. The oard thus finds that it was useless to negotiate further.

K. The foregoing evidential findings of the Board and admitted facts completely sustain the conclusion of the Court below that respondent did not discharge the Complaining Employees because they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining.

In testing the "ultimate findings" of an administrative board with relation to its evidentiary findings the same test is applied as is applicable to testing a general verdict of a jury in relation to its special verdict or findings. In the latter case the rule is well settled that where special findings are irreconcilable with a general verdict, the former will control. *Larkin v. Upton*, 144 U. S. 19; *Insurance Co. v. Piaggio*, 16 Wall. 378.

Test this case by lifting from the evidence the wilful refusal of the Complaining Employees to work under the rule of departmental seniority set forth in the contract and what is left that is explanatory of respondent's acts? Respondent did not object to the organization of its employees into an outside union. It promptly recognized their union. It bargained with the union shop committee. It made two written contracts with them. It performed those contracts. It met with the shop committee whenever requested to adjust grievances. It was only after repeated conferences extending over a two months period, during all of which Complaining Employees continued to repudiate a substantial and material provision of their contract with the respondent, leaving the positions of the parties diametrically opposed and in a state where further negotiations were useless, that respondent abrogated its agreement and took those steps necessary to fill the places of the Complaining Employees with new men, and to discharge them. The employees' repudiation of their contract at a time when further negotiations would have been useless remains the only cause for their replacement.

In the face of its own evidential findings and the admitted facts set forth above, for the Board to say that "the whole conduct of the respondent leaves no other reasonable inference than that the old employees were locked out, discharged and refused employment because they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining" (R. 38, 39), is plainly arbitrary and capricious, totally unsupported by the evidence.

L. The attempts of the Board to sustain said finding by argumentative matter in its decision demonstrate the complete lack of any substantial evidence to support it.

In its decision the Board attempted by much argumentative matter to sustain its arbitrary finding of fact. Indeed, the total lack of any substantial evidence to support the Board's ultimate finding is accentuated by the fact, demonstrated by the Government's brief (pp. 40-49), that the finding is herein sought to be sustained by argument rather than by evidence.

1. **Respondent was not required to convince the Board that the old men would be inefficient when transferred to the machine shop.**

In its findings the Board says:

> "No evidence of persuasive materiality was introduced by the respondent to substantiate the claim that the old men were unsatisfactory when transferred from one department to another. In fact, the respondent failed to put in evidence showing that any particular old men were inefficient when transferred." (R. 35.)

Here the Board again exceeds its powers. It does not take the contract as it finds it, as under the law it is required to do, but instead voids the contract for all practical purposes on the ground that the respondent did not prove that the old men would be inefficient when transferred from some

The Board refused to find, although conclusively established, that only six of the "old" men had ever been employed in the machine shop after May, 1934. (R. 75.) Of these six, four were regularly employed in it and the remaining two of the six had not worked in the machine shop for over a year. The remaining twenty-five or twenty-six "old" men had not worked in the machine shop for at least two years, if they had ever worked in it at all. (R. 433.) Obviously these "old" men would have been less efficient than regular machine shop employees.

However, it was no part of the respondent's case to prove the inefficiency of the "old" men when transferred out of their regular departments into the machine shop. Such arguments were behind it and disposed of when the employees made the contract with respondent providing for departmental seniority. The parties were bound by that contract.

Furthermore, the issue was over the machine shop. (R. 31.) The Board's finding as to production with "old" men in the tank heater department (R. 36) proves nothing with reference to the machine shop. When respondent convinced the Board that its impelling motive for insisting upon observance of the rule of departmental seniority was to obviate the necessity of transferring "old" men to departments other than their own and paying them higher wages than respondent would have to pay to "new" men usually employed in that department (R. 36), respondent established its purpose to be lawful and disassociated from any purpose to violate the Act in any particular. Insistence upon observing a lawful provision in a contract for the purpose of obviating needless expense and excessive costs violates no law.

2. The Board's claim as to a general wage reduction is a "straw man."

In its decision the Board says:

the duty devolved upon the respondent to advise the committee of the new offer. Instead, the respondent surreptitiously entered into negotiations to replace the MESA with a new set of men at lower wages, some of them belonging (in opinion of its secretary-treasurer) to a more conservative union. This conduct is not compatible with a sincere effort to bargain collectively with one's employees." (R. 38.)

This finding is based entirely upon conversations with the four or five "old" men after the A. F. of L. contract had been negotiated. (R. 32, 33.)

Even if the Board's statements in the above quoted paragraph were accurate, the theory of the argument behind them is unsound. Respondent broke with the MESA on the issue of departmental seniority. If respondent had changed its position with reference to departmental seniority there would be some force to the Board's argument. But Article V of the A. F. of L. agreement shows that respondent maintained the same position with the A. F. of L. which it had maintained with the MESA. (R. 588, 589.)

The Board's statement about a new general offer is false and misleading. There is no evidence of any new offer made to the employees generally. Respondent had no new offer to make to the MESA employees. They had refused to continue the operation of the plant under the rule of departmental seniority set forth in the contract. The Board specifically found that there was no new general offer:

"However, Hilliard J. Sands, who was present at these conversations, *admitted* in his testimony that Garry Sands told Pansky, Linsky, Dolish, and Ochs, the four men who were called back, *that the offer of reemployment was being made only to them and not to the rest of the old men.*" (R. 33.) (Emphasis ours.)

The Board's statement that the A. F. of L. agreement provided for lower wages is also less than the truth. Respondent's negotiations with the A. F. of L. began August

26th or 27th, *before* any conferences with the four or five old men. (R. 32.) The MESA employees had refused to abide by the rule of departmental seniority. (R. 31, 377, 572.) Respondent's former machine shop employees were largely A. F. of L. men. (R. 32.) The MESA did not represent them. (R. 236.) The A. F. of L. agreement contemplated the discharge of the MESA and the reemployment of the former A. F. of L. employees, called "new" men in the MESA agreement, and other absolutely new men. (R. 590.) Respondent rightfully made the best deal it could with A. F. of L. But the result was not lower wages. The A. F. of L. contract provided that the A. F. of L men should receive the same hourly wage as when last employed, and that new employees were to receive the prevailing minimums in respondent's plant, and that all employees were to receive increases at stated intervals. (R. 590.) There were only twenty-nine old MESA men. (R. 597.) All other MESA men were "new" men receiving the same wages as the new A. F. of L. men had received. (Gov. Br. p. 45.) Respondent sometimes employed as many as 70 or 80 employees. The net result therefore of the A. F. of L. agreement was probably an increase in respondent's payroll.

Pansky testified:

> "According to the management's viewpoint, why should he stick eighty-six cents an hour men on the job when he formerly paid forty-cents for new men." (R. 373.)

Aside from the fact that respondent objected to transferring "old" men at their high rates to the machine shop to do work which could be done by regular machine shop employees who received a lower rate (R. 36), the matter of a general reduction in wages is a "straw man." The Government "blows both hot and cold" at it. At one place in their brief, counsel say that "the testimony of respondent's officials makes it clear that reduction in wage rates, concomi-

ly effecting a reduction of operating losses, was the erlying source of the whole dispute." (Gov. Br. p. 25.) statement is directly contrary to the Board's finding hich we have just referred. (R. 36.) At another place eir brief counsel say that "it is apparent that the wage e of the MESA men was not the reason for their mass ination." (Gov. Br. p. 45.) This statement is in ac- with our contention since the commencement of this . (R. 23.) Departmental seniority was the issue. (R. General wage rates had nothing to do with it. The rd so found (R. 36) and by that finding the Government und in this case.

In another material aspect the above quoted finding of Board is clearly false. Garry Sands was the secretary-surer of respondent. (R. 106.) The "opinion of its sec-ry-treasurer" clearly refers to the opinion voiced by the superintendent (R. 38), Hilliard J. Sands, who was an officer of respondent company. (R. 106.) Garry ds voiced no such opinion and there is no evidence to ort the statement. We will discuss the shop superin-ent's opinion directly.

he Board made an unconscionable inference from two June nversations and erroneously found that one of them had curred late in July.

The Government's statements that the Court below ig-d the Board's findings upon evidence that following the es in May and June respondent had evinced hostility rd the MESA command attention. (Gov. Br., pp. 10, 14, 3.)

To fill its need for evidence tending to show antago-on the part of respondent toward MESA the Board o rely solely upon two conversations, one between H. s and Rudd, and the other between McKiernan and an. The Board's inference from these conversations itrary and unconscionable. (R. 38.)

The H. Sands-Rudd conversation took place not longer than ten days after June 17th, upon which date the employees returned to work after the second strike. (R. 218, 420.) The Board found that H. Sands, the shop superintendent, on that occasion said to Rudd, the MESA secretary, that "the management would rather have the International Association of Machinists than the MESA because the former was more conservative and did not call strikes often." (R. 38.) This statement, an expression of opinion by a subordinate, did not violate the Act. There was no evidence that it was voiced for the purpose of intimidation or coercion or that it had that effect. Furthermore, such a statement in June, immediately following two (2) strikes called three (3) days apart (R. 30) would be *too remote* to furnish a motive for respondent's acts in August. *Contrary to the evidence the Board adjusted the date in its findings by arbitrarily placing the conversation "late in July."* (R. 38.)

It is not unreasonable to believe that if the Board had permitted counsel for the respondent to be present at such oral argument as was made to the Board by the Board's counsel, from which argument respondent's counsel was barred by the Board and to which action of the Board respondent excepted (R. 619), such a prejudicial error would not have occurred.

In its brief, the Government does not admit the Board's very serious error as to the date of said conversation but adopts the device of stating both the Sands-Rudd and the McKiernan-Norman conversations without fixing the dates of their occurrence. (Gov. Br. p. 42.)

The McKiernan-Norman conversation took place June 26th. (R. 38.) McKiernan was the shipping clerk, Norman's boss. (R. 300, 503.) Being an inefficient employee, Norman had been passed around from foreman to foreman for the purpose of trying to find for him some job which he could perform efficiently. (R. 306.) After the June strike was settled, there was a conference and Norman was dis-

charged as completely incompetent and inefficient, and this with the approval of the shop committee. (R. 35, 425.) The Board found that in this conversation this shipping clerk had told this employee "not to worry, that he would be taken back as soon as respondent was rid of the MESA." (R. 38.) The shipping clerk denied that the MESA was mentioned in the conversation. (R. 504.) It was uncorroborated. Norman was one of several men refused reinstatement on June 26th all on the ground of inefficiency (R. 304, 309), which refusal caused the second strike. Norman's testimony (R. 298-313) indicated that he had been contemplating a claim of discriminatory discharge as he testified that "us men were to be on a charge of discrimination." (R. 311.) The fact was that the shop committee had agreed to his discharge but had never told him that fact. (R. 307.) Therefore he was hostile to the respondent and testified: "I think it was a grudge against me." (R. 302.)

The Trial Examiner, who saw and heard both Norman and McKiernan testify, did not believe Norman. In fact, neither of said conversations is mentioned in his Intermediate Report. (R. 42-62.) Counsel's footnote admitting McKiernan's denial, but stating that the Board believed Norman's statement to be true (Gov. Br. p. 42) serves only to emphasize the lack of any substantial evidence to support the finding under discussion and that the Board's finding was arbitrary.

However, the Board's action with reference to Norman speaks with much more force than its written inference concerning this conversation. If Norman's testimony was true, then Norman was surely being discriminated against. Certainly upon Norman's own case, the Board did not believe him. It did not include Norman's name in the list of those whom it ordered respondent to reinstate (R. 39) and thus the 48 Complaining Employees was reduced to 47.

We contend that these two June conversations, both of which ante-dated the Act, and neither of which took

place in July, are no evidence at all of the existence of any unlawful motive for respondent's acts late in August. Certainly they fall far short of being the *substantial* evidence required by the statute. *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 43 S. Ct. 210, 67 L. ed. 408; *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291, 74 L. ed. 431, 50 S. Ct. 89; *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147, 81 L. ed. 965, 969-970, 57 S. Ct. 648, 650; *Consolidated Edison Co., etc., et al. v. National Labor Relations Board*, 83 L. ed. Adv. Ops. pp. 131, 140. Furthermore, the inference sought to be drawn by the Board from these two June conversations is directly at variance with the Board's specific finding as to respondent's impelling motive for its acts in August. (R. 36.) Respondent's many meetings with the MESA in July and August, its proper impelling motive, and the honest opinion, which the Board concedes that Respondent had, that the MESA had wilfully repudiated their contract with it, completely dispel the inference arbitrarily drawn by the Board from these two June conversations. *National Labor Relations Board vs. Union Pacific Stages*, 99 F. (2d) 153, 177.

Furthermore, the charge was filed on behalf of 48 men. If respondent had committed any acts of hostility toward MESA as an organization, the Board would have been able to unearth some real evidence from these 48 men on that subject by November 25, 1935, the date the trial commenced, as to some act or acts nearer to August 21st, that would prove that hostility. That the Board neither found nor presented any such evidence certainly dispels any suspicion that may have been created by the two June conversations.

M. The Government's attempt in Point II of its brief to sustain said finding, when considered in the light of the evidential findings of the Board and the admitted facts, demonstrates again the complete lack of any substantial evidence to support it.

The Government's first contention is that because all MESA employees were discharged, they were discharged because they were all members of MESA. (Gov. Br., p. 41.) The question before the Board was, why were all MESA employees discharged? We submit that merely to state the problem is not to prove it. Respondent's dealings with MESA from April, 1934, through August 21, 1935, its two written contracts with MESA, the abrogation of the last written contract at a time when it still had six months to run, necessitate proof by evidence as to why was this done. The fact that they were all discharged does not prove why they were discharged.

The Government's second contention is that the MESA employees were peremptorily eliminated without any notification of any kind. (Gov. Br., p. 41.) The Board's evidential findings as to repeated conferences, diametrical opposing positions, and the committee's admitted wilful refusal to permit the departmental seniority rule to function (R. 31, 377, 572), destroy the adverb "peremptorily." The fact that on August 21st the respondent had posted the announcement: "The factory will shut down Wednesday night, August 21st, until further notice" (R. 351) did not obligate the respondent to notify the MESA employees of anything. They had refused to permit the respondent to operate its plant as it had a right to do under the contract. (R. 31, 377, 572.) The Board found that if respondent had attempted to operate under the contract, or, if the respondent had told them that the shut down meant that they would not be recalled, the MESA employees would have struck. (R. 37.) Even at the time of the trial, the

the departmental seniority clause, as we have shown above. If the Board, which did not see or hear the witnesses, could come to that conclusion as to that fixed determination of the committee, respondent is not to be blamed if it took a course of conduct based upon its similar belief that the MESA employees would continue to maintain that position. The notice of finality came from the MESA employees. (R. 377, 572.) Until a change from that position was communicated to respondent, it owed them no duty whatsoever.

Thirdly, the Government mentions the two conversations in June. (Gov. Br., p. 42.) We have already shown that the Board's inferences therefrom were arbitrary and unconscionable. (This Br. Point (L-3).)

Fourthly, the Government mentions respondent's dealings with the four "old" MESA employees. (Gov. Br., pp. 42, 43.) Respondent's acts after August 21st will be dealt with in Point Three of this brief. The inquiry here is as to the reason for its acts subsequent to August 21st. In this connection, however, we point out that the Government is completely mistaken as to time when it says that "prior to the reopening of the plant Garry Sands * * * advised them that they were the only ones whom respondent would take back," and that, "as respects two of the men, Linsky and Pansky, the offer was made upon condition that they drop their affiliation with the MESA and join the Machinists." (Gov. Br., pp. 42, 43.) The subject matter to which the Government refers was discussed only on September 4th, the day after the plant was reopened with A. F. of L. employees. (R. 379 and the Government's citations.)

Fifthly, the Government attempts to supplement the Board's findings of fact by a statement in its brief that Garry Sands "intimated" to Farrell that the MESA was trying to "break" him. (Gov. Br. p. 43.) The Board found no such fact. It allegedly occurred about August 28th. (R.

315.) Farrell's testimony was that Sands said "he didn't know whether the M.E.S. was trying to break him or not." (R. 316.) Sands denied making the statement. (R. 523.) Whether he did or did not was a question of fact for the Board. It made no such finding and the conversation is not mentioned in the Board's decision. It would seem to have no place in the Government's brief.

Sixthly, the Government mentions the Garry Sands-Hudak conversation. (Gov. Br. p. 43.) It is self-evident that the conversation took place after the complaint was filed on November 12, 1935. (R. 11.) Nothing violative of the Act appears in the quotation and the conversation is not mentioned in the Board's decision. However, the Government quotes only the latter portion of Mr. Sands' statement. The previous portion is:

> "He came in there and he asked me for a job and I said, 'Mike, the plant is all filled up now.' I said, 'If you had come around right after the strike, right after we opened on September 3rd, you might have had an opportunity—I might have had an opportunity for you.' But I said, 'Now, the plant is all filled up and we don't need any men'." (R. 529.)

There is no finding by the Board that all available jobs were not filled and there is nothing violative of the Act in the conversation.

Seventh, the Government charges Garry Sands with a lack of understanding of and hostility to an employer's obligations under the Act. (Gov. Br. p. 44.) This generalization drawn by the Government is directly at variance with the following inferences which must necessarily be drawn from the evidential findings of the Board. 1st. The respondent was *friendly to organized labor.* Witness the circumstances under which its own employees organized. (R. 29.) Witness that when it broke with MESA it immediately contracted with another labor organization, the A. F. of L. (R. 33.) 2nd. Respondent *believed in the ad-*

justment of grievances by negotiations. (R. 29, 30, 31.) Witness also the lack of any finding that while the MESA employees were employed by respondent, it ever refused to meet with them or their committee. 3rd. Respondent *believed in written contracts* after collective bargaining with its employees. *It made two of them.* (R. 29, 30.) 4th. Respondent *believed that its obligations under such contracts should be performed by it.* Witness the lack of any finding that respondent in any wise failed to perform either of its contracts with MESA. 5th. Respondent *believed that once a contract was made with its employees, they should perform it.* (R. 31.) Surely, this was not a vice. 6th. Respondent was *honest.* (R. 36.) 7th. Respondent was *patient.* Witness the repeated conferences throughout the summer although they related to an issue which respondent honestly believed, and in fact was, settled by the contract. (R. 31.) 8th. Respondent's *impelling motive had nothing to do with unionism* but was to obviate needless expense. (R. 36.) 9th. Respondent did not interfere with, coerce, or spy upon its employees. Witness the complete lack of any finding that it did.

The Government cannot contradict these facts and the testimony cited by it substantiates respondent's contention that only when Garry Sands came to the same conclusion as did the Board, namely, that it was inconceivable that the employees would change their position (R. 37) that he terminated the negotiations.

Lacking substantial evidence to support that point the Government next attempts to fortify the arbitrary conclusion of the Board. (Gov. Br. p. 44.) Substantial evidence would not have to be "fortified."

As a first attempt it states the fact that respondent attempted to re-employ four old MESA men. (Gov. Br. p. 41.) This was after August 21st and will be dealt with in Point Three, but it will be noted now that they were chosen because of their skill and for supervisory positions. (R. 343.)

The fact that they had belonged to MESA did not prevent respondent's sending for them.

Secondly, the Government states that the A. F. of L. seniority clause was similar to the position taken by the MESA during the conferences. It was not. The A. F. of L. contract made any departure from departmental seniority strictly at the discretion of the employer. (R. 588, 589.)

Thirdly, the Government urges respondent's alleged failure to discuss a new general wage rate with the MESA. (Gov. Br. p. 45.) We have already shown that the matter of a new general wage rate is a "straw man." The issue was departmental seniority. (R. 31.) The impelling motive was to obviate needless expense. (R. 36.) This argument that respondent should have tried to obtain from MESA a new lower general wage rate is completely impractical and every chance of its success is completely eliminated by the Board's evidential findings. The May, 1935 strike was called right after a 10% increase to "new" employees. (R. 601.) For almost two months respondent had striven by negotiations to secure performance of the rule of departmental seniority. (R. 31.) The Board found the employees would never have worked under the rule despite the fact they had already agreed to it. (R. 37.) And now the Government says respondent should have negotiated with that committee to obtain a reduction in the wages which the respondent was obligated to pay under the contract for six months thereafter! The Act does not require that respondent engage in negotiations which it knows are doomed to failure. Any person reading this Record would conclude that it would have been useless for respondent to have even suggested a general wage reduction to the MESA during the life of the contract. Besides, respondent did not desire a general wage reduction. It merely wanted to operate its machine shop with machine shop employees as it had a right to do and the record is clear that if the MESA

had permitted respondent to do so, there would have been no trouble whatever.

The Government's next argument is inconsistent with the previous one. It states that the wage scale of the MESA employees was not the reason for their elimination. (Gov. Br. p. 45.) We have never asserted it was. Respondent's position was set forth in its answer and general wage rates are not mentioned therein. Respondent's proof conformed to its answer. As far as concerns the 25 "new" employees who were members of the MESA and who were not recalled, they cannot escape responsibility for the authorized act of their committee. (R. 377, 572.)

Finally the Government cites our assertion that none of the MESA applied for reinstatement. (Gov. Br. p. 46.) The fact that none of them applied for reinstatement and that they picketed respondent's plant for a month (R. 34) is additional proof of the very point which the Board found, namely, that it was inconceivable that the employees would ever agree to work under the rule of departmental seniority. (R. 37.) They left the plant with that determination, they forced the shut down by that determination, and their every act subsequent to August 21st, including adherence to the same position at the hearing, manifested a continuing persistence in that determination. Respondent never promised to recall them to their former jobs. It just shut down. Until the employees changed their position and offered to return to work at the terms under which they had agreed to work, respondent, having already exhausted the possibility of agreement by weeks and weeks of negotiations, owed them no further duty.

SUMMARY OF POINT ONE.

Stated simply, there would have been no severance of relations between respondent and the MESA employees during the life of the contract if the Complaining Employees had not refused to permit respondent to operate

its plant in the manner in which it honestly believed it had a right to operate its plant under the contract. The evidential findings of the Board and the admitted facts when fairly considered show that said refusal, and that only, was the motivating cause for every subsequent act of the respondent.

The ultimate finding of the Board that the old employees were discharged because they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining is therefore not supported by and must give way before the evidential findings of the Board and the admitted facts which are controlling.

It follows, therefore, that the court below did not render "lip service only" to section 10(e) of the Act (Gov. Br. p. 47), but that it was right when it held:

> "In this case no evidence appears that the employees were discharged because of their membership in the MESA or any union." (R. 613.)

POINT TWO.

UPON THE EVIDENTIAL FINDINGS OF THE BOARD AND THE ADMITTED FACTS, THE COURT BELOW RIGHTLY HELD THAT AFTER AUGUST 21, 1935, IT WAS LAWFUL FOR RESPONDENT TO TERMINATE NEGOTIATIONS, FILL THE PLACES OF THE COMPLAINING EMPLOYEES AND TO DISCHARGE THEM.

In Point One, from the evidential findings of the Board and the admitted facts, we have shown the motivating cause for respondent's acts after August 21st was not any purpose violative of the Act.

Herein we will show that after August 21, 1935, the respondent was lawfully entitled to abrogate its agreement with the MESA, terminate the negotiations, fill the places of the Complaining Employees and discharge them.

The evidential findings of the Board and the admitted facts show two valid and lawful reasons for respondent's acts after August 21, 1935. They are: first, the impasse;

and second, the breach of contract. We contend that the impasse justified the termination of negotiations and the breach of contract gave lawful cause for the discharge of all employees who were represented by the MESA shop committee.

A. An impasse was reached between the parties on August 21, 1935.

The Court below said:

> "In view of the background, the uncontroverted facts as to the complete lack of any attempt to prevent organization or to discourage affiliation with the MESA, the want of espionage or coercion practiced on the part of the management, and the express findings of the Board as to repeated conferences, honest difference of opinion, and diametrical opposition of views, we think that only one conclusion can be drawn, namely, that the respondent sincerely attempted over a long period to negotiate with the MESA. When the men would not perform their contract an impasse arose. Respondent was not obligated to prolong the impasse and its refusal to bargain further did not constitute a violation of the statute." (R. 613.)

1. The Government has materially changed its position.

The Government has materially changed its position on the matter of the impasse since the decision of the Court below. The Board concluded, contrary to its own evidential findings, that no impasse was reached. (R. 37.) The Government contended in the Court below that no impasse was reached. (R. 617.) It now admits there was an impasse, but states that it was only temporary. (Gov. Br. p. 10.) The Government's position now is that respondent should be severely punished for failing to recognize and to distinguish between a temporary and a permanent impasse. We submit that the Government's attempt at classification is a significant admission in favor of the holding of the Court below.

2. The Board failed to give effect to the difference between negotiations looking toward the making of a contract and negotiations to secure performance of a contract already made.

Section 8 (5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively." The term is not defined in the Act. However, there is no doubt that Section 8 (5) was included in the Act chiefly to take care of the situation created by the refusal of an employer to recognize the representatives of the majority of his employees and to deal with them in an effort to arrive at a working agreement.

In its report recommending passage of the Act, the Senate committee said:

> "The committee wishes to dispel any possible false impression that the Bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the *essence of collective* bargaining is that either party shall be free to decide whether proposals made to it are satisfactory. * * *
>
> "It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement." *Senate Committee on Education and Labor*, Report No. 573, 74th Congress, 1st Session, p. 12. (Emphasis ours.)

In the case at bar it is undisputed that the respondent did recognize the representatives and that it actually made two contracts with them, each of which was reduced to writing and signed by the parties, the latter of which was by its terms to be in full force and effect from June 1, 1935

to March 1, 1936. (R. 600.) According to the Senate committee report the end sought by Section 8 (5) was attained when the contract of June 15, 1935 was negotiated and signed. Nevertheless, the Board in this case defined the respondent employer's obligation under Section 8 (5) of the Act even more stringently than the Senate committee defined the obligations of an employer in negotiations looking toward the making of a contract.

In its findings the Board says:

> "It is hardly necessary to state that from the duty of the employer to bargain collectively with his employees there does not flow any duty on the part of the employer to accede to demands of the employees. However, before the obligation to bargain collectively is fulfilled, a forthright, candid effort must be made by the employer to reach a settlement of the dispute with his employees. Every avenue and possibility of negotiation must be exhausted before it should be admitted that an irreconcilable difference creating an impasse has been reached." (R. 37.)

We contend that the evidential findings of the Board and the admitted facts show that respondent fulfilled every obligation which the Board imposed upon it by even this most stringent rule. However, we contend that it was arbitrary for the Board to apply that rule to respondent. Although it might be reasonable to require an employer to continue the status quo for a long time while negotiating the terms of an employment contract to be entered into with its employees, the Board should not have applied that rule to respondent employer who in this case, after long negotiations, definitely insisted that a substantial provision of a contract already made should be placed in effect.

The Government cites *Jeffery-Dewitt Insulator Company vs. N. L. R. B.*, 91 F. (2d) 134. In that case there was no existing agreement between the employer and the employees. The dispute there concerned the making of an agreement. But that is not this case. It is distinguishable

National Labor Relations Board vs. Biles Coleman Lumber Co., 98 F. (2d) 18; *National Labor Relations Board vs. Carlisle Lumber Co.*, 94 F. (2d) 138; and *National Labor Relations Board vs. Remington Rand, Inc.*, 94 F. (2d) 862, which are cited by the Government (Gov. Br. pp. 17, 18) did not present situations where the sole ground of dispute was the repudiation by the employees of a contract already made.

In the case at bar the parties had an existing contract. Because at any time they might have modified it by mutual consent the Act imposed upon the respondent at most an obligation to consider the refusal of the Complaining Employees to permit the enforcement of the rule of departmental seniority, treating the refusal as a request that said provision for departmental seniority be waived. Certainly no greater obligation is imposed by the Act. The respondent did consider the repudiation of the provision by the Complaining Employees through "repeated conferences." It did not see fit to waive the provision. When the time came that respondent reasonably believed further conferences would be fruitless, it had the right to insist upon giving effect to the contract. When the Complaining Employees, after many conferences, definitely refused performance in accordance with its provisions, the respondent then had the right to refuse to have further negotiations about the matter.

The Government contends that in collective bargaining between an employer and his employees over a requested change in an existing contract, the merits of the dispute cannot affect the extent of the employer's obligation under Section 8 (5). (Gov. Br. p. 31.)

This statement cannot be the law, else a strike by a group of employees during the term of a contract for the sole purpose of accomplishing a change in the contract between them and their employer, as, for example, an increase in the wage rates specified in the contract, would be

lawful on the part of the employees, and filling their plac unlawful on the part of the employer. Similarly, a lockо of employees by an employer during the term of a contra between him and his employees for the sole purpose effecting a cut in the wage rates specified in the existi contract would be lawful. In other words, if the responde employer did not have the right to stand on its contract a refuse to negotiate further on the MESA refusal to pe form, then respondent's contract was worthless. Indee the value of every collective bargaining contract would greatly lessened if the rule stated by the Board and by t Government were held to apply in such situations.

The respondent went the "second mile." It discuss the matter for weeks and weeks with the employees. T Board so finds. (R. 31.) Only after such full discussion d it exercise its right to terminate the negotiations. In quiring more of respondent the Board plainly exceeded t reasonable intendment of the Act.

3. No alternative course of action was open to respondent af August 21st except that it waive a substantial provision its contract.

It is apparent from the evidential findings and the a mitted facts: that, except it waive its rights under a s stantial provision of the contract, the respondent had alternative course of action to that which it took on a after August 21, 1935, if it would operate its plant un the rule of departmental seniority set forth in the contr (R. 31, 377, 572); that the Complaining Employees for it to take that action (R. 31, 377, 572); that the Board employed inference upon inference arising out of eve transpiring after August 21, 1935, for the purpose of c cluding that what it expressly finds was an honest posit (R. 36) actuated by a lawful motive (R. 36) and which w followed by a consistent course of conduct (R. 32), la became an integral part of an open, deliberate, and int tional plan to violate the Act. (R. 38, 39.)

At a time when respondent wanted to operate its machine shop with an increased working force, the committee, after consultation with the MESA employees, told the respondent that it could shut down its plant but it could not increase the working force in its machine shop with "new" men. (R. 377, 572.) The Board colors this fact by using the term "preferable course." (R. 32.) But the respondent knew it to be a permanent refusal and so did the Complaining Employees. (R. 377, 572.) That the committee never communicated at all with respondent (R 530), that they picketed respondent's plant for a month (R. 34), and suspended every MESA member who went to work for respondent (R. 230, 231), and that their position was the same at the trial, proves it. The Board found that it was inconceivable that the employees would have accepted respondent's interpretation of the contract even if they had been threatened with discharge at the time. (R. 37.)

4. The evidential findings of the Board show all the elements of an impasse.

The Board refused to find that an impasse had been reached. But it did find all the elements of an impasse, to wit:

1. A demand by respondent for performance according to the rule of departmental seniority set forth in the contract, that is, a single issue. (R. 31.)

2. A definite refusal by the Complaining Employees to render their services in accordance with said rule. (R. 31.)

3. Repeated conferences extending over several weeks after which the positions of the parties remained diametrically opposed. (R. 31.)

4. That respondent's position was in accordance with its honest interpretation of its contract. (R. 36.)

5. That respondent's impelling motive in maintaining that position was unimpeachable. (R. 36.)

6. That if respondent had informed the employees on August 21st that the shutting down of its plant meant the permanent loss of their jobs they would have struck rather than abide by the rule of departmental seniority; in other words, that further negotiations would have been useless (R. 37.)

The reasoning of the Board's predecessor in the following case is sound and applies in respondent's situation. The facts were that a union assessed a fine against an employee with whom union members refused to work until that fine was paid. On his failure to pay, the union demanded payment of the fine by the employer. The employer refused to pay. The employees went on strike. A charge of refusing to bargain collectively was filed under Section 7 (a) of the National Industrial Recovery Act which in substance was the same as Section 7 of the Act. Deciding the case the former National Labor Relations Board said:

> "Section 7 (a) does not require the company to do any of these things, even if the continued employment of Schmeltz in his present position, without a union card, forfeits the company's right to display the union label. We may assume that the issue was a proper subject for collective bargaining, especially in view of the long continued arrangement between the company and the union. *But the required process of collective bargaining under Section 7 (a) varies with the nature of the issue. If a very intricate wage scale is involved, a considerable time may be consumed in negotiation, with a consideration of proposals and counter-proposals before the process of collective bargaining is exhausted. In the present case, however, the issue was narrow and simple. Wright discussed it with the union representatives and after an exchange of views made it perfectly clear that he would have nothing to do with advancing money for Schmeltz's fine, which, he said, was a matter between Schmeltz and the union. The position that*

assumed by the company was not a violation of Section 7 (a). The duty of the company to bargain collectively did not require that it help Schmeltz with his fine: the process of collective bargaining had thus been carried to a point where an irreconcilable difference created an impasse.

"When, therefore, the employees went out on strike, this strike could not be ascribed to any previous violation by the company of its duty to bargain collectively. Nor did the intervention of the strike revive or enlarge the obligation of the company to negotiate on the issue of Schmeltz's fine. The situation, in this aspect, is the same as if there had been no strike, and the union had sought repeated interviews with Wright to renew its prposal that Wright do something about Schmeltz's fine. Considering the nature of the issue, Wright could have replied that further discussion was fruitless and that he had made his position clear. The strike was designed to make Wright yield on a point he had firmly taken; but his failure so to yield was not a contravention of the statute." (Emphasis ours.)

In the Matter of Clifton Wright Hat Co. and United Hatters of North America, Local No. 1, Vol. II, N. L. R. B. (Old), 452, pp. 453, 454.

The ultimate facts found by the Board cannot be at variance with its own evidential findings. Section 10 (e) of the Act does not empower the Board to ignore substantial evidence and those of its own evidential findings which incontestably prove an impasse and to arbitrarily find no impasse. Beyond any reasonable doubt an impasse had been reached in this case.

"It is the duty of the Board to decide the case before it on all the evidence. It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence."

Peninsular & Occidental S. S. Co. v. NLRB, 98 F. 2d 411, 415. Certiorari denied Dec. 12, 1938.

5. The Government's attempt to explain away the impas reached on departmental seniority by suggesting that re spondent might have raised other issues is beside the point

Respondent's obligation to the MESA employees wa to make "a reasonable effort to compose differences." (*Virginian Ry. Co. v. System Federation No. 40*, 300 U. S 515, 548.) The one point of difference was departmenta seniority. (R. 31, 573.) Both the Board, in its decision and the Government, in its brief (Gov. Br., pp. 17-28), at tempt to enlarge this single difference so as to embrac additional subject matter and for no other purpose tha to make what was actually a dispute over the sing issue of departmental seniority appear to be a dispu about something else. Such action is contrary to the evi dential findings of the Board. (R. 36.)

The first of such items is not a new issue. It is th old issue of departmental seniority. The Government con tends that respondent should have bargained further con cerning it because "no one believed that a permanent im passe had been reached." (Gov. Br., p. 21.) To the con trary, the evidential findings of the Board and the ad mitted facts as to the acts of the Complaining Employee prior to and after August 21st and the Board's conclusio from said acts (R. 37), definitely establish that to the Com plaining Employees the difference was irreconcilable. Re spondent was not unreasonable when it reached the sam conclusion as did the Board and directed its course accor ingly.

Secondly, despite Sands' denial (Gov. Br., p. 21), an without any supporting finding of fact, the Governmen contends that the events of August 21st resulted in a agreement binding upon respondent that it would shut dow its plant until sufficient orders accumulated to warra taking back all the old men in their own departments (Go Br., p. 23), and that respondent should have conferred wi the MESA before it did anything inconsistent with th alleged agreement.

As we have pointed out in Point One, C(a), of this brief, there was no agreement. Furthermore, the issue had persisted all summer in both slack and busy times. (R. 30, 294, 297, 363, 387, 573.)

The Government's contention gives no effect whatever to respondent's contract with the MESA. The Board found that respondent did not want to shut down its plant. (R. 31.) It could always shut down for lack of business without the consent of the committee. It wanted to operate its machine shop. (R. 31.) The MESA was bound by its contract to permit the respondent to run "by departments." (R. 34, 289-291, 365, 574-576, 579, 611, 612.) When the committee said that respondent could shut down its plant but it could not give effect to the rule of departmental seniority (R. 377, 572) it repudiated the seniority rule in the contract definitely and itself forced the shut down by its own wrong. For that action the MESA was entirely responsible. Respondent's only alternatives were a surrender of its right to operate or a strike. (R. 37.)

The Government states that "respondent, of course, might have adhered to its original decision after collective bargaining; but by the plain requirements of the Act it could not make that decision without collective bargaining on this new issue which it had raised." (Gov. Br., pp. 23 and 24.) That is plainly academic and theoretical. The Board found that it was inconceivable that the employees would have accepted departmental seniority, even if the respondent told them that it meant the loss of their jobs if they refused it, "especially since the men had been so successful when they struck a few months earlier." (R. 37.) The Act does not require the respondent to make an unreasonable effort to compose differences.

Respondent's decision to terminate negotiations did not create a new issue. The issue was still departmental

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seniority. Pansky and Linsky, each members of the committee, were sent for individually on August 30th. They returned on September 4th. (R. 32.) They were each told that the offer of reemployment was not being made to the rest of the old men. (R. 33.) Nevertheless, neither of them communicated to the respondent any change of position as to departmental seniority from that they had taken as members of the committee on August 21st. The old issue was still there.

The third contention of the Government is that respondent should have attempted to negotiate a general wage reduction with the MESA. (Gov. Br. pp. 24, 28.) In other words, the Government contends that respondent refused to bargain collectively because it did not offer to "trade" a waiver by respondent of departmental seniority for an agreement by the employees to accept a general reduction in wages. Here again the Government gives no effect whatever to respondent's contract.

Respondent was entitled to have its work in the machine shop performed by machine shop employees at their regular rates. The respondent should not be forced to offer to trade any part of its contract for any other part and thereby find itself with no contract at all. The matter of a general wage reduction was never discussed in any conferences. As we have already pointed out (Point One, L, 2, of this brief), the only basis for the Government's contention is the fact that after it had dealt with the A. F. of L. for the purpose of securing a new working force, the respondent attempted to hire four old men at an annual wage instead of an hourly wage for time actually employed.

But let us assume, as the Government suggests, that respondent had attempted to secure a general reduction in wages. The respondent was obligated to pay the contract rate of wages until March 1, 1936. No reasonable person in respondent's position would have concluded

that the Complaining Employees would have consented to a wage reduction at a time when the respondent was obligated to pay those wages for six more months, "especially since the men had been so successful when they struck a few months earlier." (R. 37.)

B. There was a willful refusal after repeated conferences by the Complaining Employees to render their services in accordance with the contract.

We shall not repeat the findings and the admitted facts to which we have already adverted and which show a willful refusal on the part of the Complaining Employees after repeated conferences to render their services in accordance with the rule of departmental seniority set forth in the contract, except to state again that the shop commitee, representative of the Complaining Employees, told the respondent that they preferred shutting down the plant to working under that rule. (R. 32.) Pansky and Jindra, members of the shop committee, admitted that the committee's answer to the respondent on August 21st was that it could shut down the plant but that it could not give effect to the rule of departmental seniority. (R. 377, 572.)

The contract was executed June 13, 1935. The men returned to work June 17, 1935. (R. 30.) Shortly thereafter the departmental classifications of its employees was posted by respondent. (R. 170, 175, 206, 434, 518, 574, 579, 612.) The committee admitted that it was understood that the classification was to stay that way. (R. 579.) Nevertheless, the Complaining Employees after the contract was signed never permitted respondent to give effect to the rule, and under the constant coercion of paragraph 20 of the contract (R. 602), respondent was forced to plead for its rights almost from the time that the men returned to work on June 17th. (R. 294, 297, 573, 289, 290, 291, 363, 387.) Under this coercion respondent was forced to again try out the old practice which it again condemned. (R. 290, 291, 371,

386, 387.) The Board refused to decide the question whether or not the action of the Complaining Employees was a breach of their contract. (R. 35, 64.) The Court below construed the contract. Its construction was the same as had been the respondent's interpretation of it. It held there was a willful breach of contract by the Complaining Employees. (R. 612.)

The evidential findings of the Board and the admitted facts amply sustain the statement of the Court below when it said:

> "We see no ambiguity in the contract, and agree with respondent's construction of it. To give it any other meaning is to nullify paragraph (5). The men objected to carrying out this provision, and the matter was discussed repeatedly from the time of the execution of the agreement. Respondent is not charged with breaking the contract, and in fact this record shows that it complied on its part with all the terms of the agreement, but the shop committee refused to permit respondent to increase the force in the machine shop in accordance with the contract, even though the only alternative was the closing of the plant." (R. 612.)

In so holding the Court below merely applied a well settled principle of contract law. Construing a collective agreement in Nebraska the Supreme Court held:

> "Such a collective agreement, being a general offer, becomes a binding contract when it is adopted into, and made a part of, the individual contract of each employee. A breach of its terms will give rise to a cause of action by either party.
>
> "The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, but broadly, so as to accomplish its evident aims and protect both the employer and the employee."

Rentschler vs. Missouri Pacific Railroad Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1.

In the following case union stevedores refused to unload a ship at the rate of wages set forth in the contract existing between the unions and the association of employing stevedores, one of whom was libelant's agent. They demanded a higher rate. Libels *in personam* were filed against the two unions. Libelant was awarded a decree for its damages. Referring to the contract the Court said:

> "By it the respondents establish the principle of collective bargaining, obtain the closed shop, 44-hour week, extra rates of pay for overtime, and their own working conditions, all that union labor, so far, as has ever contended for. I think the contract is valid, and imposes the reciprocal obligation on respondents to work according to the contract in good faith. There is no doubt the action of the men was arbitrary and amounted to a breach of the contract."

Nederlandsch, etc. vs. Stevedores & Longshoremen's etc. Association, 265 Fed. 397, 400.

Throughout this proceeding the Board refused to recognize that the contract imposed any obligation whatever upon the Complaining Employees. The Board held that the existence of the contract and whether or not there was a breach of it was immaterial and irrelevant. It gave no effect whatever to the admissions by the members of the committee of the repudiation of the contract. That the Board was arbitrary in this position is further evidenced by the fact that its order against the respondent is no different in its punitive respects from those customarily issued by it in cases where it has found that employers have entirely refused to recognize the representatives of their employees and have engaged in espionage, interference, restraint and coercion.

C. The breach of contract by the Complaining Employees was cause for their discharge.

The evidential findings and the admitted facts pose the following question: When the employees of an employer, after repeated conferences with their employer extending over a substantial period of time, during which the employer urges them to abide by a substantial and material provision of the contract existing between them and the employer, collectively repudiate that provision and refuse to render their services in accordance therewith, may they, therefore, be lawfully discharged under the Act? Were it not for the Board's holding that the violation of the contract was immaterial (R. 36), and the Government's contention that the contract is irrelevant (Gov. Br. pp. 29-40), there would seem to be no question but that the employees' breach of contract was cause for discharge.

This Court has said:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."
>
> *National Labor Relations Board vs. Jones & Laughlin Steel Co.*, 301 U. S. 1, 45, 81 L. ed. 893, 916, 57 S. Ct. 615, 628, 108 A. L. R. 1352, 1370.

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."
>
> *The Associated Press vs. National Labor Relations Board*, 301 U. S. 103, 132, 81 L. ed. 953, 960-961, 57 S. Ct. 650, 655.

Upon these decisions the Court below based its holding that:

> "If employees violate their contract, they may be discharged for that reason, and this does not constitute a discrimination in regard to tenure of employment nor an unfair labor practice, nor does it constitute discharge because the employees are members of a union." (R. 613.)

D. The Breach of Contract was material.

In its decision the Board states:

> "Although the Board is of the view that an honest difference of opinion existed on the construction of the June 15th agreement, the case against the respondent is not in any way prejudiced if the stand of the shop committee in resisting the demand of the respondent to build up the machine shop with new men instead of with old men is considered a violation of the agreement." (R. 36.)

The Court below, referring to the Board's statement, said:

> "We disagree with this view. While the statute creates new and important rights for labor, it does not abrogate the correlative rights of the employer." (R. 610, 611.)

The Board's statement is startling in its implications. For many years collective labor agreements have been held by the courts to be mutually enforcible. Most of the old line unions proudly maintain that they have never broken their agreements. One of the most serious problems in industrial relations is that created by the "wild cat" strike, that is, a strike initiated by employees in violation of their agreement. By such wrongful strikes, hundreds of thousands of men have been deprived of their daily livelihood. The statement from the Board's decision quoted above can not be otherwise considered than as a bestowal of the

Board's blessing on groups of employees who violate their agreements.

If in this case the breach of contract by the Complaining Employees is considered immaterial, then the contract which the Act was designed to promote between respondent and its employees was worthless, a scrap of paper, and the very purpose of the Act is nullified. The Act does not compel collective bargaining looking toward a contract and at the same time invalidate the contract it has encouraged by permitting an interpretation to the effect that an employer can not use it as the measure of his conduct toward his employees and of their conduct toward him. The Act does not encourage the making of contracts the breach of which is to be considered immaterial. The Act does not permit such a conclusion and such was not the intent of Congress.

1. By passage of the Act Congress intended to encourage the making of contracts through the process of collective bargaining between employer and employees. It did not take from such contracts any of their ordinary and usual incidents including the right to discharge for the willful breach thereof.

This Court has said concerning the Act:

> "The National Labor Relations Act seeks to protect the employees' right of collective bargaining and prohibits acts of the employer discriminating against employees for union activities and advocacy of such bargaining by denominating them unfair practices to be abated in accordance with the terms of the act."
>
> *The Associated Press vs. National Labor Relations Board,* 301 U. S. 103, 129, 81 L. ed. 953, 959, 57 S. Ct. 650, 654.

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining."
>
> *Consolidated Edison Co. of New York etc., et al. vs. National Labor Relations Board,* 83 L. ed. Oct. Term, 1938, Adv. Ops. pp. 131, 144.

In its report recommending passage of the bill, the Senate committee said:

"It seems clear that the guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. * * * Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace."

Senate Committee on Education and Labor, Report No. 573, 74th Congress, p. 12.

Stabilization of business conditions by collective agreements between employers and employees would also be a mere delusion if they be not held to impose mutually enforceable obligations. If, before the Board it is immaterial that the Complaining Employees had willfully violated their contract, then is disobedience of and disrespect for law thereby encouraged and constant strife, not peace, prescribed as our daily portion.

The Act even preserves to the employer, as well as to the employees, full right and power to refuse to make an agreement if the proposals made are unsatisfactory.

In the same report the committee said:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."

Idem. p. 12.

This Court said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer 'may by unilateral action determine.'"
>
> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 81 L. ed. 893, 916, 57 S. Ct. 615, 628, 108 A. L. R. 1352, 1369.

Under the Act the respondent was therefore within its rights in June to refuse to contract with MESA unless and until MESA agreed to the rule of departmental seniority. Respondent even had the right to hire others to take their places if they refused to agree. The Board will not dispute this proposition. But the decision of the Board is that breach of contract is not cause for discharge. Otherwise it could not have held that the fact of a breach was immaterial. Truly, if that be the effect of the Act, respondent were better off had it made no contract, for it would have been protected by the Act in its refusal to agree, whereas it is not protected once the contract is made. By such an interpretation the contract becomes worthless.

The Act is designed to promote and encourage the making of contracts. That purpose at once implies a purpose not to discourage their performance. The Board's decision that the breach of such a contract is immaterial destroys the very thing which the Act was designed to promote. Congress did not intend to encourage the making of *immaterial* contracts. It is in direct conflict with the declared policy of the Act.

The decisions of this Court interpreting the Act have preserved this right in accordance with the intent of Congress. With them, the decision of the Board in our case holding a wilful breach of contract to be immaterial is in irreconcilable conflict. We submit that the breach was material and that it was cause for discharge.

SUMMARY OF POINT TWO.

We respectfully submit that upon the evidential findgs and admitted facts an impasse was reached on August st, 1935, between the MESA employees and the respondt; that the respondent was not unreasonable in termiting negotiations at that time; that the employees' rediation of the provisions of their contract establishing partmental seniority in respondent's plant was a wilful each of contract constituting cause for the discharge of all ESA employees without further negotiations.

POINT THREE.

PON THE EVIDENTIAL FINDINGS OF THE BOARD AND HE ADMITTED FACTS THE COURT BELOW RIGHTLY ONSIDERED RESPONDENT'S ACTS AFTER AUGUST 21st THE LIGHT OF THE THEN STATUS OF THE COMPLAING EMPLOYEES AGAINST WHOM RESPONDENT HAD AUSE FOR IMMEDIATE DISCHARGE. WHEN SO CONDERED RESPONDENT'S ACTS SHOW NO VIOLATION OF THE ACT.

Neither the Board nor the Government, in their conideration of respondent's acts after August 21st, have ven any effect to the impelling motive for the acts, the passe, and the breach of contract, which establish reondent's purpose to be lawful. Instead they have given due emphasis to said acts in an attempt to make them, ther than respondent's actuating purpose, appear to be e principal issue in this case.

Confronted with the impasse and the willful breach of eir contract by the Complaining Employees, respondent, ter August 21st, was entitled to proceed lawfully to get its ant into operation with employees who would work under rule of departmental seniority.

Respondent found it necessary to do several things, l of which constituted a consistent, progressive course of nduct. (Point One, D, of this brief.) Briefly, on August th or 27th, it went to the Machinists' Union to which some

of its "new" and "old" men belonged and negotiated an agreement and arranged for additional help. (R. 32, 486, 493, 586.) The MESA never represented these A. F. of L. men. (R. 236.) Later it attempted to employ as foremen four of the "old" MESA workmen. (R. 32, 33.) It opened its plant on September 3, 1935 (R. 32), operating at first the machine shop alone for a period of about two weeks. (R. 450.) On September 4th it held final conversations with Pansky (R. 32) and Dolish (R. 330), and on September 5th with Linsky (R. 32) and Ochs. (R. 390.)

The Board arbitrarily found that on September 4, 1935, the day after respondent had reopened its machine shop, Potter telephoned respondent on behalf of the committee and asked for a meeting between respondent and the committee. (R. 33.)

We will discuss each of these affirmative steps taken by respondent in their chronological sequence and show that when they are considered in the light of the then status of the Complaining Employees, respondent did not violate the Act.

A. Respondent did not violate the Act when on August 26th or 27th it negotiated an agreement with the A. F. of L. Machinists' Union.

1. Respondent had the right to hire new employees to fill the places of the MESA.

When confronted with a lawful strike the employer whose only sin is failure to agree with the strikers on their demands, is not required by the Act to either agree with them or to sit idly by and let his business go to ruin. The strike, being lawful, the employer may not discharge the strikers but he may fill the places of the strikers and thereby effectuate their discharge.

The Court has spoken on this situation as follows:

> "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry

on the business. Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

National Labor Relations Board vs. Mackay Radio & Telegraph Co., 82 L. ed., Adv. Op., Oct. Term No. 17, 861, 867, 304 U. S. 333, 345, 58 S. Ct., 904, 910-911.

Respondent had the right to discharge the MESA employees.

On the other hand, it is unlawful for employees to strike in violation of their contract. In such case the employer guilty of no unfair labor practice, in addition to the right to fill the places of the strikers free from any obligation to discharge the new men, has the right to discharge the strikers after demanding performance. The discharge in such a case is not for union activity and membership but for breach of contract, and, therefore, is not an unfair labor practice.

In our case, as has been shown in Point Two, the respondent demanded performance after a willful refusal extending over several weeks and negotiated to an impasse.

There is no essential difference between employees insisting on continuing in employment but refusing to render their services in accordance with their contract, and their going off the job and refusing to render any services. In either case it is a breach of contract.

There is no difference between discharging one employee for insubordination and discharging two or more for the same offense. There is no difference in this case

between respondent's discharging Norman for inefficiency, i.e., a breach of his implied convenant to render efficient service, and discharging all of the Complaining Employees for their breach of contract.

To discharge one or a group of employees, after repeated conferences, for willful refusal to perform in accordance with their contract would also seem to be merely "the normal exercise of the right of the employer to select its employees or to discharge them," with which the Act does not interfere. Here again it would seem that the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than intimidation or coercion. *National Labor Relations Board vs. Jones & Laughlin Steel Co., supra.*

3. **Respondent's right to hire new employees included the right to make a contract for their services.**

Having the right to fill the places of the Complaining Employees and to discharge them, necessarily, respondent had the right to enter into contracts of hiring. It determined to discharge the MESA employees. The Carbeeks, who were constantly employed upon special work after August 21st, were A. F. of L. members. (R. 486, 501.) Many of the "new" men were A. F. of L. members. (R. 32.) The MESA contract was open shop in form, did not recognize the MESA as the exclusive bargaining agency (nor had it been so certified by the Board), and it was not so interpreted by the MESA. (R. 600, 601.) The MESA did not represent any of these A. F. of L. employees. (R. 236.) These A. F. of L. men were entitled to bargain collectively with respondent, and, until some agency, either by contract or by the Board, was constituted and functioned as the exclusive bargaining agency, the A. F. of L. had the right to deal with respondent for its members and respondent had the right to deal with the A. F. of L. *Consolidated*

Edison Co. of New York etc., et al., vs. National Labor Relations Board, Supreme Ct., Oct. Term, 1938, Vol. 83, L. ed. Adv. Op., No. 4, pp. 131, 144.

1. Respondent rightfully dealt with A. F. of L.

Furthermore, upon effectuation of the discharge of the MESA employees, the A. F. of L., as the representative of the only remaining employees, would be the only union having members in respondent's employ. Having first determined to discharge the MESA employees, respondent could negotiate, therefore, with the A. F. of L. either as representative of its members only, or, as the representative of a majority of respondent's employees. *Consolidated Edison Co. of New York vs. National Labor Relations Board, supra.* The respondent did the latter. (R. 586.)

2. There was no waiver or condonation of the breach of contract.

Whether or not respondent had yet actually discharged the MESA employees is immaterial because respondent then had the right to discharge them. It was entitled to exercise this right until it waived or condoned the breach, or until, before it had materially changed its position, the MESA had communicated to respondent a change in their position, neither of which ever happened.

The Government points to Tulow, Pansky, and Rudd, who were employed a day or two each subsequent to August 21st in respondent's plant. (Gov. Br. 34-35.) It is clear that the only workmen steadily employed during that time were the two Carbecks, A. F. of L. men, who were employed at making tools for new models. (R. 441.) No waiver or condonation of the collective breach of the contract was found by the Board from the testimony to which the Government points, nor can any be implied therefrom. The Government's statement that Rudd was employed after September 3rd is misleading. At that time, Rudd was

working for respondent's Vice-President, Joseph M. Sands, at his home, and not for respondent. (R. 223, 234, 521-522.)

6. The MESA employees were not injured by respondent's dealings with A. F. of L.

The Government contends that on August 26th or 27th the MESA was still the representative of a majority of respondent's employees. (Gov. Br. p. 34.)

The evidential findings of the Board and the admitted facts show that on and prior to August 21st all of the employees represented by the MESA were subject to discharge for cause. (Point Two of this brief.) MESA's rights as a representative must be determined by their rights as principals. By giving cause for discharge, after previous negotiations had resulted in an impasse, at the option of respondent they destroyed both their rights against respondent and the rights of their representative.

Thereafter, the only union with whom respondent could be required to deal was the A. F. of L. as the representative of those of its employees who had not given cause for discharge. It dealt with that union.

Respondent did not deal with A. F. of L. in respect of any MESA employees. The only individuals that could possibly be injured by the A. F. of L. contract would be those employees hired or working for respondent on September 3rd and thereafter, and then only, if the A. F. of L. was not the representative of a majority of them. The MESA employees did not make application for reemployment. They were prevented by MESA from making such applications. They, therefore, were not injured and there is no evidence that of those employees engaged in the plant after September 3rd, the A. F. of L. did not represent the majority.

The A. F. of L. contract was cancelled September 10, 1935.

On or about September 10, 1935, at the request of the espondent, the agreement between it and the International ssociation of Machinists, District No. 54, was cancelled y mutual consent of the contracting parties. (R. 34, 602.)

The reason for requesting cancellation of this agreeent was stated by Garry Sands as follows:

> "I didn't know what would happen if the complaint would be filed upon us, and I thought to myself well what is the use of getting into more difficulties and have two contracts, that I thought it better if I will go down and see if I can get the one contract cancelled and let the other contract take care of itself." (R. 544.)

The fact that the A. F. of L. contract was in effect only e week proves that it was no barrier to an offer by the ESA employees to perform their contract. That none as made demonstrates the determination of the committe to rule or ruin despite the contract.

Respondent's individual dealings with the four "old" men did not violate the Act.

They were sent for after the contract with A. F. of L. was negotiated. They made no voluntary applications.

On August 30th Pansky and Linsky were sent for and conference had with them jointly. (R. 32.) A second nference was had with each of them separately on Sepmber 4th, the day after the plant opened. (R. 341, 354.) olish was sent for and a conference had with him August st. (R. 329.) A second conference was had with him Sepmber 4th. (R. 330.) Ochs was sent for and a single conrence had with him on September 5th. (R. 390.) Reondent's proposition was a new employment at an annual ge. (R. 38.)

2. They were selected because of their skill.

The Board arbitrarily refused to find that these four old men were key-men (R. 77), although the request was supported by the testimony of the Complaining Employees themselves. Pansky was a foreman. (R. 381.) Linsky was a foreman. (R. 338.) Dolish was a leader or key-man. (R. 327.) Ochs was to have been given charge of the coil room and the tank heater department. (R. 391.) Garry Sands testified that he selected them because they were all-around men. (R. 543.)

The only inference supported by the evidence concerning respondent's dealings with the four "old" men is that the respondent attempted to reemploy them in order to avoid running its plant with an entirely new group of supervisors, and that, as an inducement to obtain their services as key-men, it offered them what amounted to an annual wage for guaranteed steady work. (R. 609.)

> "It is the duty of the Board to decide the case before it on all the evidence. It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence."
>
> *Peninsular & Occidental S. S. Co. v. NLRB*, 98 F. 2d 411, 415. Certiorari denied Dec. 12, 1938.

3. It was not a violation of the Act to negotiate with them individually.

In its findings the Board states:

> "We fail to see in the respondent's conduct anything other than a refusal on its part to bargain collectively with the representative of its old employees. This, especially in conjunction with the negotiations of the respondent with the four men individually, constituted a violation of the respondent's duty to bargain collectively with the representatives of its employees." (R. 38.)

This finding of the Board is erroneous for two reasons.

First, even if for the time being we do not consider that the MESA employees had all given respondent cause for their discharge, the respondent negotiated with them individually as principals. There is nothing in the Act which prohibits an employer to negotiate with an individual employee as a principal if the employee be willing. The Act requires only that the employer not bargain collectively for its employees with any other than the exclusive bargaining agent which has been chosen by those employees for that purpose.

This Court has interpreted Section 9 (a) of the Act as having for its purpose:

> "'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to Section 9 (a) of the National Labor Relations Act."
>
> *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44, 45, 81 L. ed. 893, 57 S. Ct. 615.

Second, these four "old" men had given respondent the same cause for discharge as had all other MESA employees. New employees were being hired to fill their places. The respondent was negotiating with these four "old" men in the same manner that it would have negotiated with four entirely strange individuals. The subject matter of the individual dealing was a new employment upon a new and different basis. Such individual dealing for a new employment is not prohibited by the Act.

4. Respondent's suggestion of A. F. of L. membership to two of them did not violate the Act.

(a) The Board's finding that A. F. of L. membership was made a condition prerequisite to their reemployment is not supported by substantial evidence.

We have shown that A. F. of L. membership was not discussed with Dolish or Ochs and that the Board's finding that it was required of the four old men (R. 39) is, therefore, 50% erroneous at the start. (Point One D of this brief.) The only fair inference from the evidence is that it was merely suggested to Pansky and Linsky, but that it was not made a condition of their reemployment.

Garry Sands testified that A. F. of L. membership was not made a condition of the reemployment of Pansky and Linsky, but that it was suggested only as a means whereby they would be assured of physical protection from the MESA by the A. F. of L. (R. 526-528.) Linsky admitted this on cross examination. (R. 345.) Pansky admitted being shown the A. F. of L. contract and having the opportunity to read it. (R. 379, 381.) Nothing in Article II of said contract (the only applicable provision) required respondent to make A. F. of L. membership a condition of their employment. Respondent only agreed to suggest it after a thirty days probationary period. (R. 587.) It is incredible that Pansky, a member of the MESA committee, would not have read the provisions of Article II carefully and raised the question if A. F. of L. membership were required of him and not of the others.

Upon the evidential findings of the Board and Linsky's admission, therefore, A. F. of L. membership was not made a condition of the reemployment of Dolish, Ochs, or Linsky. It is therefore unlikely that of Pansky alone it should have been required, especially in view of the fact that at the first conference, A. F. of L. was not mentioned. (R. 379.)

(b) Respondent's contract with A. F. of L. provided for a preferential shop and such contracts are lawful.

In its third assignment of error the Government complains of respondent discussing A. F. of L. membership with Pansky and Linsky on the ground that the A. F. of L. did not have a closed shop contract with respondent. (Gov. Br. p. 10.) The A. F. of L. was the representative of the majority of respondent's employees on September 4th. The MESA contract had been abrogated and the plant had been opened with A. F. of L. employees filling the available jobs. (R. 32.)

The Government contends that Section 8 (3) of the Act prohibits an employer from requiring union membership of new employees unless the employer has a closed shop agreement with the union which is representative of the majority of his employees. (Gov. Br. 49-51.) This contention is fallacious.

It is apparent from Section 8 (3) that an employer can not make such an agreement unless the union demanding it represents a majority of his employees. Conversely, the union may not lawfully demand a closed shop agreement unless it represents a majority. Therefore, under the Act, whenever a union becomes the representative of the majority it may demand: either, (a) a contract in behalf of its members, (b) a contract in behalf of all employees who desire to bargain collectively as their exclusive bargaining agent, (c) a preferential closed shop contract, or (d) an absolute closed shop contract, and the employer may agree with the union on any of said types of contract.

When Congress authorized an employer to impose membership in the majority union upon a minority of his employees against their will by a closed shop contract made with the majority union, it therefore necessarily authorized him to impose such membership as a condition of employment by means of a preferential closed shop contract. The greater, the closed shop contract, certainly includes the

lesser, the preferential closed shop contract. Otherwise, preferential closed shop contracts are illegal. Respondent's contract with A. F. of L. was for a preferential closed shop. (R. 587.) It was in effect on September 4th and 5th at the time of the conversations with Pansky and Linsky. (R. 32.) In it respondent agreed "that wherever possible and practicable in employing new help, it will employ members in good standing" of the A. F. of L. (R. 587.) Respondent further agreed to suggest union membership to new employees after a trial period of 30 days. (R. 587.) There was no need to await a thirty day trial period for Pansky and Linsky. They were selected because of their known skill.

When Congress specifically legalized the closed shop as far as the Federal law is concerned, it did not intend to invalidate preferential closed shop contracts such as respondent made with A. F. of L. Respondent's suggestion to the two old men was in accordance with that contract, and, therefore, lawful.

(c) There is no finding that Pansky and Linsky would have accepted reemployment except for such requirement.

There is no evidence and no finding that Pansky and Linsky would have accepted such employment but for said requirement. In fact, the admitted facts show the reason for their refusal to be that if they had accepted the employment, they would have been suspended by the MESA, as were the three others who were reemployed by the respondent. (R. 231.) The finding, therefore, would not form the basis for any order to reinstate Pansky and Linsky and it is therefore immaterial and irrelevant.

(d) It was not within the issues and does not inure to the benefit of the other 45 employees.

Finally, if the Board's finding be accepted as a fact as to Pansky and Linsky alone, it was not within the issues

made by the complaint, wherein is presented the issue of whether or not respondent rightfully discharged the 48 Complaining Employees. Respondent was not charged with imposing A. F. of L. membership on two discharged employees as a condition of their reemployment, and refusing to reemploy them because of their refusal to accept said condition. The fact that the Board found that respondent sent for and offered reemployment to these two former employees requiring of them A. F. of L. membership, when considered with the fact that of the other two for whom it also sent respondent did not require A. F. of L. membership, can not inure to the benefit of the other 45 Complaining Employees who broke their contract and picketed respondent's plant for a month to maintain a position which was in violation of that contract.

C. The Board's finding that on September 4th Potter asked respondent to meet with the MESA committee is arbitrary. However, even if the finding be accepted, respondent did not violate the Act in refusing to meet with either Potter or the committee.

1. The finding is arbitrary.

The Board refused to make the following finding of fact:

> "That the employees' committee made no request for a meeting with the respondent after August 21, 1935, nor did it, after that date, evidence any intention to withdraw in the slightest degree from the position it had taken in reference to departmental seniority prior to that date." (R. 76.)

There is no evidence to the contrary.

The Government states that "on the day following the reopening of the plant, the MESA asked Garry Sands to meet with the MESA committee." (Gov. Br. 8.) The statement distorts the facts.

The Board found that on September 4th, after respondent's plant was in operation, Potter telephoned Sands *in behalf of the shop committee.* (R. 33, 38.) This finding of the Board was arbitrary. We refer the Court to Potter's testimony. (R. 134, 135.) In his testimony there is no reference to a meeting with the committee. Note that his opening remark to Mr. Sands was in substance, "What the hell are you trying to pull off there?" (R. 134.)

He testified:

"Q. Did you ask him whether he would meet *you* that day?

A. Yes.

Q. Or any time thereafter?

A. Yes.

Q. Did he agree to meet *you*?

A. No.

Q. What did he say?

A. He said the MESA was out and all the old men were discharged and he had nothing to talk about to *me.*" (R. 135. Emphasis ours.)

Garry Sands denied that Potter asked him to meet him that day. (R. 530.) He also testified that Potter did not ask him to meet the committee. (R. 530.)

This telephone conversation is all the evidence there is in the record tending to support the Board's finding that the respondent ever refused a request for a meeting. Certainly, Potter's language was not a conciliatory approach for reopening negotiations, if, indeed, the committee wanted any further negotiations. Nor would respondent be unreasonable in concluding from Potter's remarks that the committee had not changed its position in reference to departmental seniority.

The Board's finding that Potter requested a meeting in behalf of the committee is grounded entirely upon the testimony of Pansky who was put back on the stand on rebuttal and then testified that he had been present with Potter during the telephone conversation. He said "Well

the end of it I heard was, 'Will you see the committee or me?' And he threw up his hands, and that is all." (R. 570.)

Considering the fact that Potter made no mention of a meeting with the committee in his testimony and that Pansky made no mention of a request for a meeting with the committee when called as a witness during the Board's case, Pansky's testimony is clearly incredible in the face of Potter's positive statement that Garry Sands "had nothing to talk about to *me*." (R. 135.)

Pansky therefore contradicted Potter, and as to a request for a meeting between respondent and the committee, Potter's testimony agrees with that of Sands who testified there was no such request. (R. 530.)

The Board's finding is, therefore, clearly arbitrary. Upon that finding principally rests the Board's entire case as to a refusal of any request to bargain. On that finding respondent is ordered by the Board to reinstate 47 men, pay them back wages for time not worked,—now over 3 years and estimated at the time of the hearing in the Court below to amount to $65,000.00 and now amounting to probably more than $100,000.00,—all because of a telephone call from a man not a member of the shop committee who began the conversation with, "What the hell are you trying to pull off there?" (R. 134.)

But even if we accept the Board's finding as most freely translated by the Government (Gov. Br. p. 8), that Potter asked respondent to meet with the committee, nevertheless, respondent did not violate the Act.

2. It was not a violation of the Act to refuse to meet with Potter.

In Points One and Two of this brief we have shown that the issue of departmental seniority had been the subject of conferences lasting practically all summer, that the respondent had negotiated to an impasse with the MESA, and that those negotiations had resulted in a positive decla-

ration by the committee that the respondent would not b permitted to operate its plant under the rule of depart mental seniority. The negotiations over that matter, had therefore, been completed. Respondent is required by th Act to make a "reasonable effort" to compose differences To require the respondent to continue further to operat in violation of its contract rights and to negotiate furthe concerning the same matter without any indication of an change in the committee's position would be unreasonable

In its decision the Board held that despite the fact tha on and prior to August 21st the Complaining Employee had given cause for their discharge, and that respondent' acts after August 21st show a continuous, progressiv course of conduct on the part of respondent to fill thei places and to discharge them, the Complaining Employees nevertheless, continued to be employees within the mean ing of the Act. (R. 36 and 37.) We contend the Board' interpretation of Section 2 (3) of the Act to be erroneous

The Complaining Employees having given cause fo their discharge by their acts on August 21st and prio thereto, we contend that respondent could either continu to recognize them as its employees or proceed to discharg them, as it did, in which event they were no longer em ployees under the Act.

The discharge of the Complaining Employees in thi case was effectuated by the abrogation of the agreemen with the MESA, the dealings with the A. F. of L., the in dividual dealings thereafter with the old men, the openin of respondent's plant on September 3rd with employee other than MESA employees, and the Garry Sands con versation with Potter. Potter interpreted these facts a having resulted in the discharge of the MESA. He testi fied, "I understood that our men were out" (R. 134); tha Garry Sands had told him, "The MESA was out and al the old men were discharged." (R. 135.) At the meetin of the MESA employees held September 5th the committee

men told the MESA employees that they were discharged. (R. 176.)

Section 2 (3) of the Act operates to invalidate only those discharges which amount to an "unfair labor practice" under the Act. It does not serve to continue the employee status when an employee is lawfully discharged. Take, for example, Norman's case in this record. Norman was discharged after a conference with the shop committee and the Board thereafter did not consider Norman as one of respondent's employees.

The Board's interpretation of Section 2 (3) would deprive the employer of the right to discharge an employee for cause without first bargaining with his union. The Act does not interfere with the normal right of the employer to discharge an employee for cause. *National Labor Relations Board vs. Jones & Laughlin Steel Co., supra.* The fact that thereafter a union makes demand upon an employer to negotiate concerning the discharge of an employee does not invalidate the discharge even if the request for a conference in respect thereto be refused, and even though the union making the request be the representative of the majority of the employer's remaining employees.

In the case at bar all of the Complaining Employees are bound by the authorized acts of their committee which give cause for their discharge. All MESA employees having been discharged for cause, the Board's finding that Potter requested a meeting in behalf of the MESA can not form the basis for an order to reinstate them any more than the request for such a meeting could justify an order to reinstate the single discharged employee in the case assumed. Nor was it a violation of Section 8 (5) of the Act. On September 4th, when Potter telephoned, the MESA was not the representative of any of respondent's employees.

That it was the intent of Congress that discharged employees retain their status of employees within the meaning of the Act only when their discharge amounted to an "un-

fair labor practice" by their employer, is apparent from the report of the Senate Committee.

> "And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."
>
> *Senate Committee on Education and Labor*, Report No. 573, 74th Congress, page 7.

Note that in the case of a discharged employee his status as an employee depends upon whether or not he was discharged pursuant to an "unfair labor practice" by the employer.

The reasoning of the Court below was identical when it said:

> "While the statute creates new and important rights for labor, it does not abrogate the correlative rights of the employer." (R. 611.)

and:

> "The controversy here was a current labor dispute within the definition of title 29, Section 152 (9), 29 U. S. C. A., Sec. 152 (9). But the statute does not provide that the relationship held in *status quo* under title 29, Section 152 (3), 29 U. S. C. A., Sec. 152 (3), shall continue in absence of wrongful conduct on the part of the employer and of rightful conduct on the part of the employees. If such were its meaning, the right of the employer to select and discharge his employees (*National Labor Relations Board vs. Jones & Laughlin Steel Corporation, supra*), which still exists in absence of intimidation or coercion in violation of the statute would be cut off. As the respondent was within its rights in not recalling the old men, their relationship was terminated by the discharge, and no discrimination in tenure existed." (R. 614.)

The Government recognizes this principle as sound. (Gov. Br. 39, 40.)

The Board also has recently recognized the foregoing legal propositions as sound. In a case where a strike was caused by the refusal of an employer to grant a union demand for a 40-hour week, which strike was but partially effective, the employer continued to operate and to fill the places of the strikers. Although that respondent did engage in some unfair labor practices, the Board said:

> "Since we have not found that the strike was induced or prolonged by the unfair labor practices in which the respondent engaged, we shall not make our usual order in such cases that the strikers be reinstated to the positions which they held prior to the beginning of the strike."
>
> *In the Matter of American Manufacturing Concern and Local No. 6 Organized Furniture Workers*, 7 NLRB No. 92, p. 11, decided June 7, 1938.

There would seem to be no justification for the Board's attempting to maintain in this Court a position at variance with published decisions of the Board involving the same legal principle.

SUMMARY OF POINT THREE.

In its consideration of respondent's acts subsequent to August 21st the Board gave no effect to the impasse, to the breach of contract, or to respondent's lawful purpose in demanding performance.

On the other hand, the Court below gave effect to each of these matters. It held that respondent's acts by which it abrogated the MESA contract, procured other employees to fill their places and discharged them, when considered in the light of the fact that the Complaining Employees had given cause for their immediate discharge, were lawful and not in violation of the rights of the Complaining Employees under the Act.

We respectfully contend that the Court below was right.

THE ERRORS ASSIGNED ARE NOT WELL TAKEN.

Five errors are assigned. (Gov. Br. p. 10.)

The Government adheres to the position of the Board giving no effect to respondent's contract with the MESA

It still contends that whether or not there was a breach of the contract by the MESA employees was immaterial and irrelevant. (R. 36.)

It contends that the respondent must negotiate with its employees to secure performance of a contract already made to the same extent as any other employer might be required to negotiate with his employees over the terms of a contract to be made in the future.

The Government implies that the respondent owed a duty to abandon the existing contract and negotiate a new one on materially different terms.

Whatever duty respondent owed as to negotiating to secure performance of its existing contract would seem to be satisfied by two months negotiations. The negotiations were honestly and sincerely carried on. They were in pursuance of a lawful purpose. Even the Board was compelled to find that if on August 21st respondent had told the MESA of the closing of the plant and that the MESA employees would be recalled only on the basis of the employees performing their contract, they would have struck. The respondent, therefore, had reached an impasse and the wilful refusal of the MESA employees to permit respondent to operate its plant under the contract, was a breach of their contract and a cause for their discharge.

Each of the errors assigned by the Government is consistent with the Board's theory of the immateriality of the contract and its breach. Each assumes the existence of facts contrary to the Board's evidential findings and to the admitted facts in the record. Therefore, all being predicated upon a false foundation of law and fact, are not well taken.

THE BOARD'S ORDER.

The Board's order (R. 41, 42), if enforced, would have rewarded the Complaining Employees for their wilful breach of contract and punished the respondent for believing that the contract with its employees imposed upon them an obligation to perform and acting on that belief.

Section 10 (c) of the Act limits the Board to requiring employers to cease and desist from unfair labor practices and to ordering employers "to take such affirmative action * * * as will effectuate the policies of this Act." Referring to this section this Court said:

> "We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."
>
> *Consolidated Edison Co. etc. et al. vs. NLRB*, 83 L. ed. October Term, 1938, Adv. Ops. pages 131, 144.

The Board's decision did not define the rights of the parties. It did not settle the question of departmental seniority. It still left the dispute pending and undecided. The order could not possibly serve to effectuate any of the policies of the Act.

Consider the practicalities of the situation.

The respondent was ordered to offer to the Complaining Employees reinstatement to their former positions "with all the rights and privileges previously enjoyed." What were those rights and privileges?

Should the respondent have offered the employees reinstatement with departmental seniority in effect? The Board's order was silent on the point.

Should the respondent have waived the departmental seniority rule and offered reinstatement on that basis? The Board's order was silent on the point.

Should the respondent have reinstated the Complai ing Employees and then immediately informed them th if they refused to work under the rule of department seniority it would again close the plant and they would n be recalled? The Board's order was silent on the point.

The Board's order required respondent to reinsta with back pay at all events, and regardless of the willin ness or the unwillingness of the Complaining Employees work under the rule of departmental seniority. What cou be more arbitrary?

The Board did not settle anything by its decision. U less respondent waived departmental seniority the conti versy would still have existed and the Complaining E ployees would have continued to refuse to work. Wh then? The one simple question which was determinati of the rights of the parties, namely, their respective righ under the contract, the Board refused to decide, holdi that to be immaterial and irrelevant. How could the c issue which had occupied the attention of the parties f two months of negotiations be immaterial and irrelevant?

Giving full effect to the admitted facts and to all e dential findings of the Board which were supported by su stantial evidence, and, finding no basis for the Board's co clusion that the Complaining Employees were discharg because of their union membership, the Court below pr ceeded to give effect to respondent's contract and adju cated the rights of the parties in the light of its breach the Complaining Employees. We submit that there cou be no proper determination of the rights of the contendi parties otherwise, and that because the order was bas on findings of fact and conclusions of law which entire disregarded the contract, it was properly set aside.

CONCLUSION.

It is unreasonable to believe that respondent would have proceeded as it did after August 21st unless it were confronted with a condition in its plant which it despaired of correcting in any other way. It is unreasonable to believe that in so doing it was motivated by opposition to the right of its employees to organize and bargain collectively when it had at all times permitted them to freely exercise all such rights, had made contracts with them, and after reaching an impasse with them, filled their places by immediately making contract with another "outside" union.

It was arbitrary of the Board to find against the respondent when respondent's lawful purpose is corroborated by the evidential findings of the Board, by admissions of the Complaining Employees, and by other evidence in the record which is not denied.

On the record the Court below felt compelled to set aside the Board's order. We respectfully submit that its action in so doing should be affirmed.

Respectfully submitted,

HARRY E. SMOYER,

WELLES K. STANLEY,

Counsel for the Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 274.—October Term, 1938.

National Labor Relations Board, Petitioner, *vs.* The Sands Manufacturing Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 27, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals denied the petition of the National Labor Relations Board for enforcement of an order against the respondent and granted the respondent's petition to set aside the order.[1] We issued the writ of certiorari because of alleged conflict.[2]

After complaint, answer, and hearing, the Board found that the respondent, an Ohio corporation which manufactures water heaters in Cleveland, had engaged, and continued to engage, in unfair labor practices as defined by Sec. 8, subsections (1), (3), and (5) of the National Labor Relations Act,[3] and ordered the company to cease and desist from violating those provisions and to offer reinstatement to former employes with compensation for loss of wages from September 3, 1935.[4]

The respondent contends and the court below held that upon the findings of fact, and the uncontradicted evidence, the Board's conclusions are without support in the record. The petitioner insists that there is evidence to support them. From the findings, and the uncontradicted evidence, these facts appear: In the spring of 1934 most of respondent's employes joined the Mechanics Educational Society of America (hereinafter called "MESA"), an independent labor organization. The respondent manifested no op-

[1] 96 F. (2d) 721.

[2] See Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134.

[3] Act of July 5, 1935, c. 372, 49 Stat. 449, 452; U. S. C. Supp. III, Tit. 29, §158.

[4] 1 N. L. R. B. 546.

position to their so doing, expressed its willingness that its men join any organization they chose, and readily met with a shop committee of the union to discuss grievances and working conditions. An agreement effecting an increase of wages, and affecting working conditions, was entered into between the respondent and the union. Although limited in term to sixty days it was continued, by mutual agreement, and under it all matters of controversy between employer and employes were settled by conference between the shop committee of the union and officials of the company.

In May 1935 the committee demanded, and the company refused, an increase of wages. A strike was called, but negotiations went on between the company and the union. All differences were adjusted save that the company was unwilling to reinstate certain men alleged to be incompetent. The union insisted that these men be taken back and thereafter be afforded a hearing by the management and the shop committee. When work was resumed the company did not permit the men in question to return. Thereupon a second strike was called. Negotiations again ensued as a result of which the shop committee agreed to draft and submit a contract to the respondent. This was done. The management demanded certain changes in the draft, to which the committee agreed; a contract extending to March 1, 1936, was executed on June 15, 1935, and the men returned to work. The agreement provided that the company would recognize the shop committee as representing the employes for collective bargaining; that no employe should be discharged without a hearing before the shop committee and the management; that certain employes should be discharged and not rehired; that stipulated notice should be given of layoffs due to shortage of work; that new employes might join any labor organization they chose. It also covered wages and hours of work. It further provided: "In case of a misunderstanding between the management and the employes, the committee shall allow the management forty-eight hours to settle the dispute and, if then unsuccessful, the committee shall act as they see fit." Provisions as to seniority will be presently stated.

In 1934 the company had an opportunity to procure a government order. Its officers conferred with the men and stated that they would take the government order if assured that no labor trouble would interfere with its execution. On receiving this assurance the order was taken and the working force more than

doubled by the employment of new men. It was agreed with the union that these men might join the MESA and in fact many of them did so. It was also agreed that when the government order was finished these new men should be discharged so that the old men could remain at work.

The company's plant was divided into a number of departments, one of which was the machine shop. The wage scales differed in different departments and the foremen and old men whom the company employed in each department received higher wages than new men in the same department. The company had had a practice of keeping the old men at work, in case business was slack, by transferring them from their own departments to others at their regular pay. When negotiations were under way for the agreement of June 15, 1935, the company insisted on discontinuing this practice of transferring old men from one department to another, stating that it would recognize, as theretofore, the seniority rights of old men but only in the departments in which particular men belonged. The management insisted that the practice of transferring men from one department to another resulted in inefficiency. The Board has found that the company in fact disapproved of the practice because it resulted in paying higher wages than would have been the case had the new men been retained or recalled to the busy department instead of transferring old men from other departments thereto. As a result of the insistence of the respondent, certain paragraphs of the proposed draft submitted by the employes were altered. These paragraphs follow, with the alterations demanded by the management in italics:

"(5) That when employees are laid off, seniority rights shall rule, *and by departments.*

(6) That when one department is shut down, men from this department will not be transferred or work in other departments until all old men *only* within that department, who were laid off, have been called back.

(7) That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days."

On June 17, 1935, the company hired approximately 30 additional men, some of whom had worked for the respondent while the government order was being filled. By the middle of July work was becoming slack and respondent proceeded to reduce its working

force. About July 15, 1935, after conferences between the management and the employees, all the men in the tank heater department except the foreman were laid off.

In the agreement of June 15, 1935, the 31 men who were employes of the respondent prior to the government order of 1934 were designated as "old men" and those employed while the government order was being filled were "new men". About July 30, 1935, a notice was posted on the time clock in the plant that the new men would be laid off on July 30 and the old men would be laid off on August 2, 1935. After the layoff of the new men another notice was posted to the effect that the plant would be operated with the old men on a schedule of three days a week.

Thus, by the end of July or the beginning of August, some departments were being operated on a part time basis and others had been practically shut down. At or about this time, the respondent wished to increase the working force in the machine shop, the key department, while at the same time shutting down the other departments. Repeated conferences were held between the management and the shop committee in reference to this matter. The positions of the respondent and the employes were diametrically opposed. The management contended that new men, experienced in machine shop work, be employed in preference to the old men. The shop committee contended that, under the agreement of June 15, 1935, the respondent could not hire any new men for the machine shop as long as old men were still laid off. The management claimed that the shop committee was insisting upon a violation of Article 5 of the agreement. On August 19th an officer conferred with the shop committee and announced that the company would either keep the machine shop running according to the company's plan or temporarily close the plant. The committee was requested to confer with the employes and communicate their decision. After conference with the employes the committee stated that the company would not be allowed to run the machine shop unless it transferred old men in lieu of new men to that shop, and that if it did not comply with this condition it could close the plant. Accordingly, on August 21st, notice was posted that the plant would be closed until further notice.

August 26th and 27th officers of respondent negotiated with the International Association of Machinists, an affiliate of the American Federation of Labor, and, on August 31st, made a contract

with that union effective September 3rd. It also recruited labor from the county relief organization. Practically all of the employes so obtained were members of the International. It offered reemployment to several of the old MESA members, as foremen, on the basis of annual employment at a lower hourly wage instead of the higher hourly wage theretofore paid them, subject to layoffs. The offer was refused. September 3rd the plant reopened. On September 4th, a representative of MESA called an officer of respondent and demanded a conference. The demand was refused on the ground that the men had been discharged. The MESA picketed the plant for about a month thereafter.

The Board held that the company had refused to bargain collectively with the representatives of its employes as required by Section 8(5) of the Act; had discriminated in regard to hire or tenure of employment and discouraged membership in a labor organization contrary to the provisions of Section 8(3); and, in violation of Section 8(1), had interfered with, restrained, and coerced its employes in the exercise of the right of self-organization, affiliation with labor organizations and collective bargaining as guaranteed by Section 7. The Circuit Court of Appeals disagreed with these conclusions. We hold that its decision was right.

First. The petitioner urges the correctness of the ultimate conclusion that the respondent's conduct permits no reasonable inference save that the employes were locked out, discharged, and refused employment because they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining. We think the conclusion has no support in the evidence and is contrary to the entire and uncontradicted evidence of record.

The respondent did not attempt to prevent organization of its employes or discourage their affiliation with MESA or interfere with their relations with that body. There is no evidence of espionage or coercion by the company. Immediately upon the unionization of the men in the spring of 1934, the respondent recognized and conferred with the shop committee whenever requested so to do. May 2, 1934, it entered into an agreement with the union. It consulted the union respecting hiring of additional employes for the filling of the government order in the autumn of 1934 and complied with its promise to discharge additional men hired for this purpose when the order had been completed. All but three of the men hired became members of MESA without objec-

tion on the part of the company. From May 1934 to May 1935 the company negotiated with the union and the latter never had any trouble in getting meetings with the management. When, in 1935, a strike was called as a result of the refusal of the shop committee's demand for a wage increase, the company continued negotiations during the strike and made an oral agreement under which the strikers returned to work. When three days later they struck again because of a refusal to reinstate some of their number, although a representative of MESA said several of these men might be incompetent, the company took the men back and continued to negotiate with the union with the result that a draft of a contract was submitted by the shop committee. After the company had insisted on certain changes with respect to departmental seniority, the draft ripened into a contract June 15, 1935.

Thereafter the respondent had hearings with the shop committee as to the discharge of an employe for incompetence and there is no suggestion that, between June 15th and August 21st, it failed to live up to its contract in any respect. Repeated meetings were held with the shop committee to discuss the terms of the contract respecting departmental seniority. The evidence of the members of the shop committee demonstrates that this matter was fully discussed before the contract was executed and that the members of the committee understood the company's position and the reason for the alterations in the committee's draft. Throughout the summer of 1935 the company, while adhering to its position, attempted to accommodate its practices to the demands of the shop committee, evidently in order to avoid a strike. When the final conference of August 19th took place the company's manager made it clear to the committee that he desired to operate the machine shop with the new men belonging in that department and when the committee advised him this would not be permitted he asked them to go to the men and find out whether the proposed operation would be permitted or whether the plant would have to be shut down. On August 21st the committee brought back a reply to the effect that the company could shut down the plant but could not operate the machine shop on the principle of departmental seniority. The company then closed the plant and did not open it until it had employed new men under a contract with another union which gave it the option to enforce departmental seniority. Save for one item of evidence, this is all the record discloses to indicate that the

discharge and replacement of the men arose from a discrimination against them for union activities and the exercise of the right of collective bargaining. Manifestly it is not only insufficient to sustain any such conclusion but definitely refutes it. The Board supports the conclusion by reference to the testimony of two men. One, Norman, who was, with the union's consent, discharged after the agreement of June 15, 1935, for incompetency, testified he thought he was discharged as a result of a grudge. He said that in June, one McKiernan, a shipping clerk who was his superior, told him when he complained about his discharge: "I will tell you; there is a lot more of this than you and I know of" . . . "I will get you back when we break this union up" . . . There is the further testimony of a witness Rudd who says that the superintendent said to him in June, in effect, that it would be better to have the A. F. of L. union as they were more conservative and not so likely to strike. This was just after MESA had called two strikes in the plant. Neither of the men who are quoted held such a position that his statements are evidence of the company's policy even in June, two months before the discharge, and the inference of hostility to MESA drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of union activities and in dealing freely and candidly with MESA.

Second. The Board held that respondent violated the obligation imposed upon it by the statute to bargain collectively with representatives of its employes. The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that employment contracts binding on both parties should be made.[5] But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning. Upon this basis the respondent was not deficient in the performance of its duty.

The contract provided for departmental seniority, in sections 5 and 6, and section 7 did not create any ambiguity on the subject. Moreover, the record makes it clear that the committee which

[5] Report No. 573 of Senate Committee on Education and Labor, 74th Cong., 1st Sess., p. 12.

negotiated the contract on behalf of the union fully understood its terms in the same sense as did the respondent. In this situation how often and how long was the company bound to continue discussion of the committee's demand that the provisions of the contract should be ignored? It is to be borne in mind that section 20 of the contract provided that if the company did not meet the committee's views within forty-eight hours the employes reserved full liberty of action and this meant that if the company did not accede to demands a strike might follow.

We come then to consider the situation of the respondent in August 1935. The Board has found that it desired to operate its machine shop in accordance with its honest understanding of the contract. Its motive, whether efficiency or economy, was proper. It had stated its views to the committee. The committee was adamant; its stand was that the company could close its entire plant if it chose, but it could not operate the machine shop in accordance with the provisions of the contract. If it attempted the latter alternative a strike was inevitable. The Board found that it was inconceivable that the employes would have accepted the company's construction of the contract even if they had been threatened with discharge at the time. It is evident that the respondent realized that it had no alternative but to operate the plant in the way the men dictated, in the teeth of the agreement, or keep it closed entirely, or have a strike. When the representatives of the two parties separated on August 21, no further negotiations were pending, each had rejected the other's proposals and there were no arrangements for a further meeting. On the following days the factory was closed.

The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employes' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employes.[6] No such request was made prior to

[6] Compare National Labor Relations Board v. Columbia Enameling and Stamping Co., No. 229, Oct. T., 1938, p. 5.

September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer.[7] As the respondent had lawfully secured others to fill the places of the former employes and recognized a new union, which, so far as appears, represented a majority of its employes, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employes.

It is urged that the company's offer to re-employ four men as foremen on the basis of guaranteed annual compensation, at a lower hourly rate than had theretofore been paid them, is evidence to support the Board's finding of a refusal to bargain collectively with the union. The argument is that if the company had made a similar offer to all of the men this might have formed a basis of compromise, since one of the employes to whom an officer talked indicated that the men might be willing to take a cut in wages; but there is no evidence that the company had any thought of offering a similar contract to others than the foremen of departments, and the breach of contract of which the men were guilty left the company under no obligation to initiate negotiations for a new and different contract of employment with them.

Third. Certain occurrences subsequent to August 21, 1935, are urged by the Board in support of its finding that respondent's discharge of its forty-eight employes constituted discrimination against the union and failure to bargain collectively. The first of these is its application to the International Association for men and its making an agreement with that union on August 26th and 27th. If, as we have held, the respondent was confronted with a concerted refusal on the part of MESA to permit its members to perform their contract there was nothing unlawful in the company's attempting to procure others to fill their places.[8] If the respondent

[7] Compare National Labor Relations Board *v.* Fansteel Metallurgical Corp., No. 436, Oct. T., 1938, p. 6ff.

[8] Compare National Labor Relations Board *v.* Mackay Radio & Telegraph Co., 304 U. S. 333, 345.

was at liberty to hire new employes it was equally at liberty to make a contract with a union for their services.[9]

The offering of re-employment to four of the old employes, upon a new and different basis, is said to constitute discrimination against MESA, but the answer is that if the whole body of employes had been lawfully discharged the law does not prohibit the making of individual contracts with men whose prior relations had thereby been severed.[10]

Fourth. The Board found as a fact that in offering re-employment to two of its old men the respondent stipulated as a condition that they join the International union. The finding is sharply challenged but, as there is evidence in support of it, we accept it. Based upon this finding the Board contends this stipulation in connection with the offer to hire the men was a violation of Section 8(3) of the Act independent of any of the violations flowing out of the discharge and refusal to re-employ the men as a body. The contention is irrelevant to any issue in the cause. The complaint alleges that the discharge of the men constituted an unfair labor practice in violation of Section 8(1) and (3) and that the execution of the agreement with the international association constituted an unfair labor practice under Section 8(5). It nowhere refers to any discrimination in hiring any man or men or charges any violation in connection therewith.

The decree is

Affirmed.

Mr. Justice BLACK and Mr. Justice REED dissent.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9] Compare Consolidated Edison Co. v. National Labor Relations Board, No. 19, Oct. T., 1938, p. 16.

[10] Compare National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 44, 45; National Labor Relations Board v. Fansteel Corp., No. 436, Oct. T., 1938, p. 10.